

Sines, et al. v. Kessler, et al., 3:17CV72, 10/22/2021

1 UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF VIRGINIA
3 CHARLOTTESVILLE DIVISION

4 ELIZABETH SINES, ET AL., CIVIL CASE NO.: 3:17CV72
5 OCTOBER 22, 2021, 10:12 AM
6 FINAL PRETRIAL CONFERENCE

7 Plaintiffs,
8 vs.

9 Before:
10 HONORABLE NORMAN K. MOON
11 UNITED STATES DISTRICT JUDGE
12 JASON KESSLER, ET AL., WESTERN DISTRICT OF VIRGINIA

13 Defendants.

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1 (Proceedings commenced, 10:12 a.m.)

2 THE COURT: Good morning. Call the case, please.

3 THE CLERK: Yes, Your Honor. This is Civil Action
4 Number 3:17-cv-00072, Elizabeth Sines and others versus Jason
5 Kessler and others.

6 THE COURT: All right. Plaintiffs ready?

7 MS. DUNN: Yes, Your Honor.

8 THE COURT: Defendants ready, such as --

9 MR. CANTWELL: As ready as I'm going to be.

10 THE COURT: Excuse me?

11 MR. CANTWELL: As ready as I'm going to be, Judge.

12 THE COURT: All right. Thank you.

13 I'll remind everyone that under Standing Order
14 2020-12, the Court's prohibition against recording and
15 broadcasting court proceedings remains in force. Attorneys,
16 parties or staff or members of the public or press accessing
17 this hearing today may not record or broadcast it.

18 Thank you for being here today.

19 I will ask at this time any defense counsel who are
20 participating remotely to note your appearance.

21 MR. KOLENICH: Your Honor, this is Jim Kolenich for
22 defendants Kessler, Damigo, and Identity Evropa.

23 THE COURT: Okay.

24 MR. SMITH: Your Honor, this is Joshua Smith for
25 David Matthew Parrott, Matthew Heimbach, and Traditionalist

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1 Worker Party.

2 MR. CAMPBELL: Good morning, Your Honor. This is
3 Dave Campbell for Defendant James Fields.

4 MR. ReBROOK: Your Honor, this is William ReBrook for
5 the National Socialist Movement and Jeff Schoep.

6 MR. JONES: This is Bryan Jones for League of the
7 South, Michael Hill, and Michael Tubbs.

8 THE COURT: All right. Anyone else? Any other
9 attorney?

10 All right. Are there any defendants proceeding
11 pro se who are participating by videoconference?

12 MR. SPENCER: Yes. This is Richard Spencer.

13 THE COURT: All right. Anyone else?

14 All right. Mr. Cantwell is here in the courtroom.

15 Plaintiffs' counsel, if anyone is going to argue
16 today, would you note your appearance at this time?

17 MS. DUNN: Good morning, Your Honor. Karen Dunn for
18 the plaintiffs.

19 MS. KAPLAN: Roberta Kaplan for the plaintiffs.

20 MR. BLOCH: Good morning, Your Honor. Michael Bloch
21 for the plaintiffs.

22 THE COURT: Thank you.

23 MR. SANCHEZ: Good morning, Your Honor. Giovanni
24 Sanchez for the plaintiffs.

25 MS. PHILLIPS: Good morning, Your Honor. Jessica

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1 Phillips for the plaintiffs.

2 MR. MILLS: Good morning. David Mills for the
3 plaintiffs.

4 MR. LEVINE: Good morning. Alan Levine for the
5 plaintiffs.

6 THE COURT: All right.

7 MR. TOLENTINO: Good morning, Your Honor. Raymond
8 Tolentino for the plaintiffs.

9 THE COURT: Thank you.

10 Let me say a few words about the COVID-19
11 precautions.

12 For those here in person, I'll remind you about a few
13 points concerning the Court's COVID-19 precautions. Everyone
14 should wear a mask over their nose and mouth at all times,
15 although if you are vaccinated and you are speaking on the
16 record it may be difficult to hear you, and I may ask you to
17 remove your mask or speak up.

18 Please remain socially distant and remember to
19 conduct the required daily self -- health self-assessment to
20 see if you have any symptoms that preclude you from coming in.
21 If so, you can always participate remotely by videoconference.

22 That's it for the COVID precautions. Please just
23 make sure that you are familiar with and compliant with the
24 COVID-19 health precautions order. If you don't have it, we'll
25 get a copy for you.

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1 All right. We all know this case is set to start on
2 Monday. I'd like to make a few comments, though, regarding
3 what I perceive to be the agenda for today.

4 I'll give each lawyer or *pro se* defendant a chance to
5 speak on this before the day is over.

6 I would propose we proceed as follows: If we're
7 going too long past noon we'll take a break and have lunch, but
8 we may be finished before then.

9 First, I thought we might take up any obvious
10 for-cause strikes that have been revealed to you in the
11 questionnaires that we received.

12 Secondly, I wanted to discuss the nuts and bolts of
13 the voir dire jury selection process and how we will be
14 proceeding through the trial, witnesses, any objections, and
15 the like, as a logistical matter on a daily basis. Perhaps
16 then would be a good time to take a break, but we'll see at the
17 time.

18 We can take up any remaining motions upon which any
19 party would like to be heard. You may have seen the Court
20 issued a number of orders this morning resolving various
21 outstanding motions, and there are more to come.

22 On the matter of the strikes, I know we don't
23 normally do this, but my experience is we spend a lot of time
24 listening to people in voir dire telling us things that
25 obviously they are going to be excused from. I was just hoping

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1 if we could get rid of some of those people and avoid just
2 going -- spending all that unnecessary time, it would be a good
3 time to do it. And I don't know whether you've had an
4 opportunity or not to go through these questionnaires so that
5 we -- we have a few that we thought might fit the category.
6 And if we can do that, I'd like to do it now.

7 First of all, we have a number -- during this
8 process -- let me say this: Under the Court's order, each
9 side, plaintiffs and defendants represented by counsel, were
10 able to designate a limited number of lawyers to get access to
11 two types of documents and the redacted jury questionnaires,
12 which are responses to questionnaires we sent to prospective
13 jurors, and a jury occupation list, which is a document
14 compiled by the Court which assists in making their choices
15 regarding selecting the jury. We have, I believe, 110-plus
16 redacted jury questionnaires that were made available to the
17 parties electronically. Each contained responses to about 70
18 questions.

19 Now, Mr. Cantwell, I note, as a *pro se* party under
20 the Court's orders, you may also get access. Any *pro se* party
21 may get access to those two types of documents while you're in
22 the courthouse for personal use, but the Court is requiring any
23 *pro se* litigant to file a declaration under penalty of perjury
24 that they will not make any unauthorized disclosure. So you
25 can participate today on this issue. I will allow you to

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1 declare orally under penalty of perjury you won't disclose
2 anything unauthorized, and then you can fill out a declaration
3 later.

4 The bottom line for everyone is: You may only refer
5 to any prospective juror by number. Each questionnaire has
6 been redacted so that it has a number on the front. Use that.
7 That's for today and going forward Monday and Tuesday on jury
8 selection.

9 Mr. Cantwell, did you want access to these?

10 MR. CANTWELL: I'm sorry. Did you say "Campbell" or
11 "Cantwell"?

12 THE COURT: Cantwell.

13 MR. CANTWELL: Yes, I'd like access, please.

14 THE COURT: Have you read the orders that were
15 provided to you -- that's Dockets 1172 and 1204 -- regarding
16 jury questionnaires, and do you agree to follow those under
17 penalty of perjury and other court sanctions?

18 MR. CANTWELL: Judge, I'm not sure I received those
19 orders.

20 THE COURT: Well, I don't know whether you have or
21 not, but anyway, we will -- we will proceed and maybe you can
22 print them out. Can you print them out?

23 The clerk's office has a binder in person for you to
24 use. The Court has done this to shield the jurors from the
25 substantial publicity of the case to the extent possible and to

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1 shield the prospective jurors from the limelight, which is an
2 important step to ensure fair and impartial jurors can remain
3 so. If for some reason something specifically requires you
4 somehow -- something with regard to a name, you can approach
5 the bench, but it will be -- no name of any prospective juror
6 will be mentioned so that it's public.

7 MS. DUNN: Your Honor?

8 THE COURT: Yes.

9 MS. DUNN: I apologize for interrupting you. At
10 least speaking for myself and a couple others, we're having a
11 very hard time hearing, and so I don't know if there's any
12 way -- we want very much to hear what you're saying.

13 THE COURT: Okay. I'll tell you what: The acoustics
14 are not -- very bad. And when -- I have trouble even hearing
15 you. When you're speaking, you may remove your mask, but try
16 to socially distance. I'll leave it up to you all to look out
17 for your own health on that side -- but only when you're
18 speaking.

19 MS. DUNN: Thank you, Your Honor.

20 THE COURT: I know I'm hard to understand sometimes.

21 All right. If you have access to Juror Number 182,
22 I'm looking at a number of jurors here, too, that we have --
23 have work-related issues. One is a nurse, and we've been
24 very -- Number 182, she's a nurse and -- part of a team of two
25 nurses. We've been very -- trying to do what we can to excuse

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1 medical people during the trial. Lots of these people work at
2 the University hospital, and they are really strained.

3 MR. CANTWELL: I'm sorry, Judge. What juror number
4 did you say?

5 THE COURT: 182.

6 MR. CANTWELL: 182?

7 THE COURT: Right.

8 MR. CANTWELL: My juror list seems to stop at 98.
9 I'm looking at a list here, but I have --

10 THE COURT: Well, Juror 182, I'll just say this: It
11 would be very likely that I would excuse her if we went through
12 the voir dire process. Is there any objection to excusing her
13 now?

14 MS. DUNN: No objection, Your Honor.

15 MR. CANTWELL: No objection, Judge.

16 THE COURT: Okay. Anyone on video?

17 MR. SMITH: No objection, Your Honor.

18 THE COURT: We're going to excuse Juror 182.

19 All right. 156 is -- this lady has --

20 MR. SMITH: Your Honor, you said 182 for that last
21 one?

22 THE COURT: Yes.

23 MR. SMITH: Okay. Thank you.

24 THE COURT: Now I'm looking at 156. It's a lady --
25 she talks about having a dog that's going to give puppies

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1 sometime in the middle of the trial. I mean, that's -- I know
2 that's a serious thing, but she does have a child with special
3 needs that's homeschooled, and I would -- I think that's the
4 kind of hardship that would justify the Court excusing her.

5 MS. DUNN: No objection, Your Honor.

6 THE COURT: Any objection?

7 MR. KOLENICH: No objection.

8 MR. SMITH: No objection.

9 THE COURT: All right.

10 This is one that's sort of unusual. This is 236.
11 It's a person who is a student at UVA and participating in an
12 NCAA tournament that's coming up at this time. Generally I
13 would excuse anyone -- any student from a trial this long. I
14 can't imagine that it wouldn't disrupt their whole semester,
15 even if they weren't an athlete, but I would think this is a
16 good excuse.

17 MR. SMITH: No objection.

18 MR. CANTWELL: What number?

19 THE COURT: 236.

20 MS. DUNN: Your Honor, we would raise only that we
21 may get other students, and it could be that there are students
22 whose class schedule is such that they could sit on this jury.
23 So we would only ask that maybe we have the opportunity to
24 question this juror.

25 THE COURT: I'm sorry? Take your mask down.

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1 MS. DUNN: I'm sorry. I apologize.

2 Given where we are, there may be students in this
3 venire, and we would just request to ask these students what
4 their class schedule is like because they may be able to serve
5 based on their current class schedule.

6 MR. SMITH: Your Honor said this student was an
7 athlete, correct?

8 THE COURT: Yes.

9 MR. SMITH: That's the reason why --

10 THE COURT: I think this student creates a special
11 situation above and beyond the average student. If there's no
12 objection with regard to this one student, I would excuse her.

13 MS. DUNN: We understand, Your Honor.

14 MR. KOLENICH: No objection.

15 THE COURT: All right.

16 Now, there are a number of prospective jurors who
17 have indicated bias beyond the likelihood of redemption. And
18 I'm looking at -- well, let me say one other thing right now.

19 There was one juror that I have taken because of
20 sensitive information, being that the juror had been on the
21 grand jury that indicted Mr. Fields. I removed him. I didn't
22 want to take any chance on his name coming out, and I didn't
23 think there would be any possible way he could be qualified to
24 serve.

25 MS. DUNN: Understood.

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1 THE COURT: I'm looking now at one of those that I
2 pulled out. It was Number 150. Just the comments that are
3 made in there, it would just seem to me it would be hard for
4 him to be rehabilitated as a juror.

5 Any argument about that? I'm just saying on the face
6 of it, I would think he would have to be excused for cause.

7 MS. DUNN: Yes.

8 MR. CAMPBELL: Judge, this is Dave Campbell. I would
9 agree. That's a juror I was going to bring up with the Court.
10 I think his responses clearly indicate a predilection.

11 THE COURT: All right. With no objection, I'm
12 excusing Number 150.

13 The next one is 156 -- correction: 175. He's
14 56 years old. 175. And he has -- he has problems with COPD,
15 will not wear a mask, and he has -- seems to have a rather
16 confirmed opinion about the case.

17 MS. DUNN: No objection.

18 THE COURT: Any objection from the defendants? I
19 think he would go out for cause.

20 MR. SMITH: No objection.

21 MR. CAMPBELL: No objection.

22 THE COURT: We'll excuse, then, 175.

23 All right. Do we have any others in that stack?

24 MR. CANTWELL: I'm sorry, real quick. I'm trying to
25 find -- I understand the issue with the mask. I'm trying to

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1 find the confirmed view of this. I understand there's several
2 pages there, but this is the first time I've ever seen these
3 documents.

4 THE COURT: I know it's the first time. Go ahead.

5 Okay. They are the ones that we have pulled that we
6 thought were fairly obvious, but there may be others we can
7 agree on. And if so, you may bring them up.

8 MR. CANTWELL: I mean, if somebody wants to -- I
9 understand there's several pages to this. I can try to be
10 quicker about it if I understand what it is --

11 THE COURT: Well, he has COPD. Just turn to the last
12 page and you'll see some of the answers there would just
13 indicate that he's pretty well-set. He has COPD. He's not
14 going to wear a mask. Can't -- says he has a medical reason
15 not to wear a mask.

16 MR. CANTWELL: Are we concerned that he thinks Antifa
17 are useless criminals?

18 THE COURT: What?

19 MR. CANTWELL: Are we concerned that he has the view
20 that Antifa are useless criminals?

21 THE COURT: I would --

22 MR. SMITH: Your Honor, I haven't seen the jury
23 questionnaires yet. Did he say that?

24 MR. CANTWELL: Yes. He said -- Question 34: "Are
25 you familiar with Antifa?"

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1 "Yes."

2 "If yes, how would you describe Antifa?"

3 He called them "useless criminals."

4 And I'm not sure if that's something that is
5 disqualifying in here. I mean, I understand the COPD and mask
6 issue --

7 THE COURT: I'm just saying that we have so many
8 jurors we have to go through. If it's obvious that at the end
9 of the voir dire a juror is going to be struck for cause, and
10 if we can agree on that now, it will save us going through all
11 that time with those jurors.

12 Now, this person not only, you know -- he has, you
13 know, some pretty strong feelings here which I -- they're not
14 real clear, but he -- my greatest concern is that he has COPD
15 and he cannot, will not, wear a mask.

16 MS. DUNN: There are several people in this pool who
17 say they won't be masked; they can't function under the COVID
18 protocols. We marked some of those as well. And I don't
19 think, given the situation in the Court, that we can have
20 people who refuse to cooperate with the protocols.

21 THE COURT: That's the issue.

22 MR. CANTWELL: Just so we're clear, are we going to
23 adopt the position that everybody who refuses to wear a mask is
24 going to be excluded from jury service? Is that the standard
25 that we're going to go by?

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1 THE COURT: I would like to do that.

2 MS. DUNN: That would be our position.

3 MR. SMITH: I feel like that's going to somehow work
4 out to the benefit of the plaintiffs in this case, but it's
5 pretty hard to object considering that, like, if they don't
6 want to wear a mask, either they get to not wear a mask or the
7 proceeding doesn't go on. And this trial is happening. So,
8 you know, it just seems like that's really the only way to go
9 with it.

10 MS. DUNN: Your Honor, I tend to agree with that. I
11 think it's good for nobody if this trial gets shut down because
12 we get COVID.

13 THE COURT: Right. This person, I thought, was --
14 that's the reason I thought he was a particular case, because
15 he may have a medical excuse not to wear a mask.

16 MR. CANTWELL: All right. So if we run into somebody
17 who says --

18 (Overlapping speakers.)

19 THE REPORTER: I'm sorry, Mr. Cantwell. Can you
20 repeat that?

21 MR. CANTWELL: If we come across a juror who says "I
22 am familiar with Antifa and I think they're saving the
23 country," we're going to exclude them, too, right?

24 MR. SMITH: Yes, Cantwell. Of course. Of course.

25 MR. CANTWELL: Okay. Fantastic. Then no objection.

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1 THE COURT: Well, if we can agree that anyone who
2 will not wear a mask, we will -- but this one I pulled out, he
3 is not only -- he won't wear them -- he says he won't wear a
4 mask, but he has a medical reason not to wear a mask, which is
5 COPD. And it's hard to breathe with that.

6 All right. Do you all have any other -- plaintiffs
7 can start, if you have any jurors you would like to bring up.

8 MS. DUNN: Your Honor, we do have a number of them.
9 One thing that it might help the parties to understand before
10 we start is whether these jurors are called into the box, as it
11 were, by numerical questionnaire order or if they're called in
12 some other fashion, because we started our review --

13 THE COURT: It's a random jury and there is a
14 fixed -- when we start taking strikes, it will be the random
15 list.

16 Heidi, would you speak to that, maybe? I'm not sure
17 how --

18 THE CLERK: So are you asking, when you get to take
19 your peremptory challenges, how they're going to be?

20 MS. DUNN: Let me ask it so I make sure I'm asking
21 the right question.

22 My question is: When the first set of jurors are
23 called into the box -- I understand they won't be in the actual
24 box, but into the gallery --

25 THE CLERK: They'll be seated by that pool sequence

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1 number.

2 MS. DUNN: Right. So they're seated in sequence,
3 start by questionnaire number?

4 THE CLERK: Correct.

5 MS. DUNN: Okay. So we started our review at the
6 beginning of the questionnaires and we got through as much as
7 we could, and so we can do those today. But we didn't
8 necessarily get to the very end of the list.

9 THE CLERK: In essence, the pool sequence is their
10 name. And they'll be seated in the courtroom by that pool
11 sequence number. It's their alphabetical name.

12 But when we start doing your peremptory challenges,
13 it's going to be a whole different random numbering, numbers
14 that they don't know. They will no longer be referred to by
15 their name number. So they won't know who we're referring to
16 when you're doing your peremptory strikes.

17 MS. DUNN: Okay. Got it. That makes sense. But
18 just -- so basically --

19 THE CLERK: But just them sitting in the courtroom,
20 they'll be by that full sequence number.

21 MS. DUNN: Right. And it goes in order -- number
22 order by whoever is left after people go for cause?

23 THE CLERK: Correct.

24 MS. DUNN: And then when they're replaced, they're
25 replaced by whoever is sequentially next?

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1 THE CLERK: Correct. The number won't change. They
2 will keep that number. Like, 175 will be up, and then we'll go
3 to 176. You know what I'm saying?

4 MS. DUNN: Yeah. That makes sense.

5 THE CLERK: No number changes.

6 MR. CANTWELL: If I could ask for a point of
7 clarification here. This process that we're going through with
8 the jury -- I received a document when I was in Grady County,
9 Oklahoma that -- the title of it was something to the effect of
10 "Joint Proposal for a Partially Anonymized Jury." Does that
11 ring a bell, the protocol that we're going by here?

12 So I just wanted to point out that that document that
13 I received said that I had agreed to it, and I sent a response
14 to that to the Court saying that I don't have any recollection
15 of agreeing to anything of the sort.

16 Now, I see the merits in protecting the jury from
17 unwanted attention, but I'm troubled by several things I've
18 seen that say that I agreed to them, that I have not, in fact,
19 agreed to.

20 THE COURT: Okay.

21 MR. CANTWELL: I just wanted to add that to the
22 record.

23 THE COURT: You can bring that up at the time. As
24 far as the jury is concerned, I mean, it was agreed among those
25 who considered it. And the Court would order it anyway. I

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1 mean --

2 MR. CANTWELL: I'm sorry. It was agreed -- those who
3 what?

4 THE COURT: Well, I'm saying -- of those who spoke to
5 the issue, those who considered it, who were available to speak
6 to it, that they agreed. But what I'm saying, whether they had
7 agreed or not, it would have been the Court's order. So you
8 didn't miss anything by not -- not agreeing to it, on that
9 issue. And you can bring that up on anything -- you know, when
10 it comes up.

11 MR. CANTWELL: Okay.

12 THE COURT: All right. Do you want to bring up any
13 particular number?

14 MS. DUNN: I think we can just start at the -- in the
15 early numbers and go through it.

16 THE COURT: I'm going to have my clerk sit here and
17 hand me -- all right. Which number?

18 MS. KAPLAN: We're just moving around here because
19 Mr. Bloch has access to the questionnaires and I don't.

20 MS. DUNN: This is actually a question we had. Are
21 counsel, including Ms. Kaplan, able to see the redacted
22 questionnaire? So no names and no occupations, but is she able
23 to see -- and others similarly situated, are they able to see
24 the questionnaires that are redacted?

25 THE COURT: Well, as long as they are in the

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1 courtroom -- I mean, I issued orders on this. I don't want to
2 be getting off-base, but we're here now. I don't see any
3 problem with anyone in the courtroom looking at it.

4 MS. DUNN: Thank you, Your Honor.

5 MS. KAPLAN: Thank you, Your Honor. We acted in an
6 abundance of caution, of course, but thank you.

7 MS. DUNN: Our first person is Juror 153. There are
8 two issues we think are cause challenges. One is his -- he
9 says he can't abide by court rules because he can't wear a mask
10 for a long time. So similar to the earlier individual.

11 And then the second issue had to do with -- there are
12 people who have scheduling conflicts. Some of them are
13 particularly disqualifying. And this person says that they
14 have an immovable conflict. He works for -- he or she works
15 for himself and are the only employee.

16 THE COURT: Well, do the defendants have any comment
17 on that?

18 MR. SMITH: Could you tell me what he said about the
19 mask situation again? He said -- he didn't say he wouldn't
20 wear it, but that he can't wear it for a long time?

21 THE COURT: He said he can't wear it for a long time.

22 MS. DUNN: It says: "Are you willing to abide by any
23 rules that the Court institutes regarding social distancing and
24 wearing masks during trial if you're selected as a juror?"

25 And he answers: "No," and then explains: "Can't

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1 wear a mask for a long time."

2 MR. CANTWELL: I'm sorry, what page is this on?

3 MS. DUNN: It's on page 15 of Questionnaire 153.

4 MR. CANTWELL: Your Honor --

5 MR. SMITH: Go ahead, Chris.

6 MR. CANTWELL: I'm having -- I mean, it's still early
7 in the process, clearly, but I'm noticing a pattern here that
8 people who get their news from The Drudge Report and Dan
9 Bongino --

10 THE COURT: Well, there's no pattern quite yet. One
11 doesn't create a pattern.

12 MR. CANTWELL: This is two.

13 THE COURT: If we don't agree, we're not going to
14 stand here and debate it. We can bring him in and ask him
15 about the mask. I mean, what's "a long time"? We don't know.

16 MR. CANTWELL: Good point.

17 THE COURT: But if we can't agree, we don't agree,
18 and so -- at this point.

19 MR. SMITH: Your Honor, I haven't had a chance to
20 review the juror questionnaires yet, and I would like to sort
21 of hear more or see more about what the responses were before
22 we make a decision on it, if that's okay with the Court.

23 MR. SPENCER: Saying that you can't wear a mask for a
24 long time, that seems to be a reasonable comment to me.

25 THE COURT: Okay. I've found that some who are

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1 not -- they don't like masks, and maybe they'll change their
2 mind. I mean, when they get here, they'll do what they're
3 supposed to.

4 MR. SPENCER: I totally agree.

5 MS. DUNN: Your Honor, two things: One is this
6 person answers the question whether they can follow the Court's
7 rules by saying no, and we just established that when
8 Mr. Cantwell asked for equity, that we would apply equity. So
9 I think the defendants right now are doing what they're
10 accusing us of doing. That's the first thing.

11 The second thing I would say --

12 THE COURT: All right. Well, let's take each -- let
13 each situation stand on its own feet.

14 MR. SMITH: Your Honor, we --

15 THE COURT: We're not going to agree on this one, so
16 I'm not going to rule right now as a matter of law that he
17 couldn't --

18 MS. DUNN: Your Honor, I would like just for the
19 record to make one other point. One of the first people that
20 you struck, you struck for their extreme views because they
21 used words like "these people are terrorists." This 153 uses
22 this same language about people being terrorists. So we --
23 just like Mr. Cantwell, we're looking for equity. So if 150
24 was struck because of his strong language, that would apply
25 equally to 153 and other people who are in this pile.

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1 MR. CANTWELL: It's my understanding that the prior
2 juror was struck because he refused to wear a mask at all
3 because he had COPD. And I'm not sure that thinking of Antifa
4 as terrorists after they spent 2020 looting and burning is a
5 controversial point of view.

6 MS. DUNN: Your Honor, Mr. Cantwell is talking about
7 a different person. We're talking about Juror 150, who the
8 Court has --

9 THE COURT: Let me check 150 again.

10 MR. SMITH: I mean, if they say Antifa are
11 terrorists, are any of the plaintiffs Antifa?

12 MR. CANTWELL: I think they deny that allegation.

13 MR. SMITH: So I'm not exactly seeing why that would
14 be prejudicial towards the plaintiff.

15 MR. SPENCER: I concur.

16 MS. DUNN: Your Honor, this is -- first of all, the
17 numerosity of voices feels a little bit like ganging up.

18 MR. CANTWELL: Oh, my God.

19 MR. SMITH: Is that a joke? I'm sorry. Is that a
20 joke?

21 THE COURT: Let's address your remarks to the Court,
22 not to each other. That doesn't work out very well.

23 Okay. We're going to -- 150, there was no way to
24 redeem him and everybody agreed. There's no agreement on this,
25 the one that we're now speaking of.

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1 MS. DUNN: Your Honor, I -- I think the same logic
2 applies from 150.

3 THE COURT: Well, it may be, but everybody agreed on
4 the other one. They don't agree now. So we're not sitting him
5 on the jury. The question is: Can we -- are there people we
6 can agree who obviously will have to be struck for cause?

7 MS. DUNN: Then, Your Honor, we would ask -- I didn't
8 realize that. And therefore, we object on 150. I mean, this
9 is the -- it's the same thing.

10 THE COURT: Well, I'm trying to -- I was trying to
11 get somewhere with this. If you think -- I mean, as an
12 attorney, you're telling me you think 150 is redeemable?

13 MS. DUNN: Your Honor, what I'm saying is --

14 THE COURT: Okay.

15 MS. DUNN: It's the same situation. There are people
16 here who use extremely strong language.

17 THE COURT: Okay. I understand that. But Antifa is
18 not a party to the case.

19 MS. DUNN: I agree with that, Your Honor, but core to
20 the defendants' argument is going to be talk about Antifa. So
21 there are a number of people here who are bringing very extreme
22 views.

23 THE COURT: Aside from -- are there any on the jury
24 list that, other than for bias --

25 MS. DUNN: Yes.

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1 THE COURT: -- that you think should be removed?

2 MS. DUNN: Yes.

3 THE COURT: Then 150 will be back on the list.

4 MS. DUNN: Thank you, Your Honor.

5 MR. SMITH: Is 150 -- you said that there was a
6 Fields juror for his state trial. Was that 150?

7 THE COURT: 150 is 150. I don't -- I haven't
8 committed them to memory.

9 MR. SMITH: Of course not, Your Honor.

10 THE COURT: Okay.

11 MR. SMITH: Does anyone know that?

12 MR. CANTWELL: 150 -- I don't recall the reason that
13 he was taken off, but --

14 THE COURT: Well, he's back on. So let's pass that.

15 MR. CANTWELL: Okay.

16 MR. SMITH: Okay. All right. Fair enough.

17 MS. DUNN: All right. May I, Your Honor?

18 THE COURT: Yes.

19 MS. DUNN: All right. Juror 160, also in response to
20 the question --

21 THE COURT: Why are we back on 150?

22 MS. DUNN: 160.

23 THE COURT: 160. Okay.

24 MS. DUNN: His answer to Question 68: "Are you
25 willing to abide by court rules with regard to COVID?" He says

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1 "No. It's against my belief as a Christian."

2 MR. SMITH: No, Your Honor. He can come in. He or
3 she.

4 THE COURT: Maybe our rules on COVID can fit his
5 Christian beliefs. I mean, we can see what --

6 MR. SMITH: Vaccines I would be fine with, Your
7 Honor. The mask is against -- no, absolutely not. He can come
8 in.

9 THE COURT: I think -- let's go to the economic
10 hardship cases.

11 MS. DUNN: This person also has economic hardship.
12 He says, "I lost a lot of work for being sick for two weeks and
13 I'm self-employed."

14 MR. SMITH: Is there anything else?

15 THE COURT: That's sort of -- that type of thing, we
16 don't know quite enough about him.

17 MR. SMITH: What juror number was that?

18 MR. CANTWELL: We're on 160.

19 MR. SMITH: I thought 160 was the person with the
20 Christianity won't let me wear the mask. I thought that was
21 160.

22 THE COURT: That's 160. We're going to have 160
23 come. You're not agreeing to it, right?

24 MR. CANTWELL: Right.

25 THE COURT: At this point I don't think the Court

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1 can -- unless it's something that the Court -- there are legal
2 reasons the Court -- we normally tell jurors they don't have to
3 come when it's obvious. But if it's someone that I can't
4 strike without bringing it up to the parties, I don't think --
5 I'm not going to take them off the list now.

6 I was thinking maybe we could come to some agreement
7 about some of them, then we don't have to listen to their
8 speeches and we can get rid of them today. That would be
9 helpful.

10 MS. DUNN: Your Honor, there are a number of people
11 who when they're asked if they could follow the Court's COVID
12 rules say no. And so the reason we've raised those --

13 THE COURT: Well, okay. I understand, but like you
14 say, sometimes they say that and they get here -- I mean, I had
15 to try a case a couple of weeks ago and a number of them had
16 answered that question and then they -- when they got here,
17 they didn't -- they did what they were supposed to do.

18 MR. CANTWELL: It's been my understanding from what
19 media coverage I've seen of this that some people initially
20 raise --

21 THE COURT: Let's go on with this case.

22 MR. CANTWELL: Okay. Fine.

23 MR. SMITH: Your Honor, you were saying that there
24 was -- one of the jurors after 160, there was somebody that was
25 saying that they were self-employed and they needed -- and they

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1 couldn't take -- or they couldn't afford to take the time off
2 of work or something?

3 THE COURT: Yes.

4 MR. SMITH: That was after 160? So what number was
5 that one?

6 MS. DUNN: That is 160.

7 THE COURT: Well, you're not going to find anybody
8 who says they can take a month off of work.

9 MR. SMITH: Oh, of course. I was --

10 THE COURT: But there are certain people you can tell
11 that you're probably going to excuse because they can't -- it's
12 going to be a real hardship beyond that which is common to all
13 persons.

14 MR. SMITH: Absolutely.

15 THE COURT: And that's what I was asking, if you see
16 anybody like that you'd like to bring up as a possibility.

17 MS. DUNN: Just to explain, the reason we flagged --
18 he's a self-employed person who does not think he could take
19 off work. But the main thing with that individual is his
20 refusal to follow the COVID protocol.

21 THE COURT: Well, I mean, we'll have to get him in
22 here and ask him. We may have to tell him he's got to do it.
23 He doesn't have any reason not to, other than -- I forget now
24 whether he's a religious guy. But anyway, let's go on to
25 another one. Have you got anybody else?

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1 MS. DUNN: So number -- well, Number 161 says that
2 they were exposed to somebody with COVID. So I don't know --

3 THE COURT: Well, it would be long gone --

4 MS. DUNN: -- if we care about that.

5 THE COURT: -- by the time he gets here Monday.

6 MS. DUNN: I mean, Your Honor, our understanding was
7 that the reason these questionnaires are so detailed is to
8 streamline the process. So 161 is a teacher. She lives an
9 hour and a half away. She says many things on her
10 questionnaire designed to not serve on this jury. She has an
11 autoimmune disease. She's been exposed to someone with COVID.
12 I mean, plaintiffs would strongly favor streamlining this
13 because what's going to happen is people will just come in and
14 then they'll get excused.

15 MR. SMITH: No objection to that one, Your Honor.

16 MR. SPENCER: No objection.

17 THE COURT: No objection to 161?

18 MR. CANTWELL: I have an objection to it because this
19 is what we're seeing. Turn to page 4 of the questionnaire.
20 Who do you admire most? George Bush, Ronald Reagan. What do
21 you watch? Fox News. Right? So what I think is happening
22 here, and it's predictable, is that we're finding people that
23 the plaintiffs don't want on the jury and looking for an
24 excuse --

25 THE COURT: Well, you haven't had your chance yet,

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1 sir.

2 MR. CANTWELL: I'm sorry?

3 THE COURT: After we finish with the plaintiff, which
4 is the normal procedure in court, the plaintiff goes first,
5 then we'll go to you. And I would expect that you all will
6 find people in this pool that don't favor you.

7 MR. CANTWELL: Right. And then the plaintiffs will
8 object.

9 THE COURT: I'm not surprised that the plaintiff is
10 probably bringing up people that they may otherwise not want on
11 the jury. But my point is: Just think about the day we
12 pick -- start doing the voir dire of this jury. If at the end
13 of the voir dire the lady is still a teacher, has some other
14 problem, the fact that she's biased is not -- she may be so
15 biased that she can't sit. But the bias is not going to change
16 the fact that she may be otherwise unqualified, or may have an
17 excuse. If it's obvious the person has an excuse, that's what
18 I'm trying to get rid of today.

19 MR. CANTWELL: And I agree with you, which is why I
20 agreed to the gentleman with the COPD problem. What we're
21 describing here is somebody who says I have at some point been
22 exposed to somebody with COVID-19, which I think describes the
23 entire population of the United States and most of the world.

24 THE COURT: Well, she wouldn't be excused for that
25 reason.

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1 MR. CANTWELL: Well, precisely. That's why I'm
2 objecting to it.

3 THE COURT: I mean, if she would be excused, it may
4 be for the fact that she is a teacher and -- I don't know what
5 else her problem would be.

6 MS. DUNN: Your Honor --

7 THE COURT: We would not be able to excuse all
8 teachers.

9 MR. CANTWELL: She's a history teacher and she's very
10 upset about the historical monuments being taken down, I think
11 is the real issue.

12 MS. DUNN: Your Honor, just to be clear about what
13 the issue is, there are people who have filled out these
14 questionnaires who -- sorry, Your Honor.

15 THE COURT: 161 I'm not excusing as of yet.

16 MS. DUNN: All right. Your Honor, 171 is an
17 individual who says he needs hearing aids but can't afford
18 them. He also says that he has economic hardship, and he also
19 says he can't decide this case based on the evidence.

20 And just for the record, we looked at -- some of
21 these questionnaires are filled out with so many cause bases
22 that these people likely do not want to serve, and will try to
23 get off this jury in any event. So rather than waste
24 everyone's time -- but even if all we knew is that he needed
25 hearing aids but couldn't afford them, that would be

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1 sufficient.

2 MR. CANTWELL: I'm sorry, which page did he say I
3 can't judge this case based on the evidence?

4 THE COURT: It's Number 171. He cannot hear and
5 cannot afford hearing aids.

6 MR. SMITH: We don't object to excusing that juror,
7 Your Honor. Josh Smith again.

8 MR. CANTWELL: I would say based on his answer to
9 question 43, that he's heard things that make it difficult to
10 be fair and impartial, then that's something that he has to be
11 excused for, yeah.

12 THE COURT: With no objection, I'm excusing 171.

13 MS. DUNN: Moving with all alacrity to 172, this
14 individual says that he or she is unvaccinated and would be
15 uncomfortable around people he doesn't know. And so we flagged
16 this for the COVID issues.

17 MR. SMITH: No, Your Honor, I don't think that meets
18 the standard we agreed on. So I think we should bring them in
19 and inquire further.

20 MR. CANTWELL: I agree with Mr. Smith.

21 MS. DUNN: For the record, just so we're clear, Your
22 Honor, the defendants have accused us of, you know, not liking
23 people of a certain profile. And at the beginning of this
24 hearing we agreed that we would apply an equitable standard to
25 people who couldn't -- who were not -- who would not wear a

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1 mask. This person is unvaccinated and doesn't want to be
2 around other people. The Court has made everybody attest to
3 come in here, even today.

4 MR. SMITH: I'd like to know more about them before
5 we make a decision. I'm not saying that we won't decide that
6 they should ultimately be excused, but I don't have enough
7 information to make a decision at this time.

8 MR. CANTWELL: I know that I have not agreed to
9 anything that says all the jurors in this case have to be
10 vaccinated.

11 MR. SMITH: Cantwell is right.

12 THE COURT: All right. At this point we'll leave 172
13 on.

14 MR. SMITH: I'd just like to say --

15 THE COURT: We didn't hear that.

16 MR. SMITH: I just want to say I think we're doing
17 great so far. I think we agreed on five or six of them, four
18 or five. I think that's great.

19 THE COURT: Okay. I'll let the plaintiff continue if
20 you have any others.

21 MS. DUNN: Thank you, Your Honor.

22 Juror 188. There are a number of cause issues with
23 this individual. The first is -- hold on. Let me make sure
24 I'm at the right questionnaire. I am not.

25 So he says he's doing training for his new job out of

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1 town in Boston through the end of November. His training dates
2 are set and he already has airline tickets. He also says in
3 question 73 that the absence from his job is already weighing
4 on his mind and he won't be able to focus on trial.

5 And so I think -- oh, and then on question 70 he says
6 he can't -- he might not be able to follow the law in this
7 case. But leaving that reason aside, I think the other two
8 reasons are sufficient cause bases.

9 THE COURT: Okay. Any objection to this one? It
10 seems to me that he does have an unusual hardship that other
11 jurors don't share.

12 MR. SMITH: Your Honor, she cut out a little bit
13 there. So I didn't get the -- I got the one -- the reason, he
14 might not be able to apply the law, but like the first reason
15 she was saying, I didn't hear that exactly.

16 THE COURT: This is the man that has -- he's training
17 for a new job out of town in Boston through the end of November
18 and this would interfere with that training.

19 MR. SMITH: I don't have any objection to that. We
20 can excuse him.

21 MR. CANTWELL: No objection.

22 THE COURT: Okay.

23 MS. DUNN: Your Honor, Juror 189 --

24 THE COURT: All right. Let me be sure it's on the
25 record that we stated 188 is excused.

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1 Okay.

2 MS. DUNN: I apologize, Your Honor. Is it my turn?

3 Juror 189, this was an issue that I think we had
4 agreement on earlier. He says he cannot set aside his
5 preconceived notions to decide this case. The second problem
6 that's cause basis is his answer to 70, which is he says "the
7 reason for a jury is to decide if a law itself is just." And
8 so our concern here is jury nullification. He's basically said
9 he's willing to do that on his form, and that would be his job.
10 I don't think any of us would favor such a juror.

11 But the second reason is one that I think we agreed
12 to earlier, which is he says clearly he can't set aside his
13 preconceived notions to decide on the evidence.

14 MR. SMITH: Does he know what the case is about yet?

15 THE COURT: Mr. Smith, I didn't understand that.

16 MR. SMITH: Oh, he can't set aside his preconceived
17 notions. Does he know what the case is about?

18 MS. DUNN: Your Honor, if I may, his questionnaire
19 does reflect that he knows what the case is about. He says he
20 can't decide it on the evidence, and he believes his job as the
21 juror is to decide whether the law itself is just.

22 MR. SMITH: I'd like to know more about him before we
23 make a decision on him. I don't know yet.

24 THE COURT: I would just say if he persists in that
25 belief, he's someone I would excuse for cause.

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1 MR. SMITH: Yes, of course, Your Honor.

2 THE COURT: But if you want to bring him in, we'll do
3 that.

4 MR. SMITH: Yes, Your Honor.

5 THE COURT: 189 is not excused at this point.

6 MS. DUNN: Juror 221 asks -- two things. One is
7 similar to the gentleman with the COPD. This person says he
8 has A-fib and high blood pressure, but I think also very
9 critically says he cannot decide the case on the evidence.

10 MR. CANTWELL: What question number is this where he
11 said he can't decide on the evidence?

12 MS. DUNN: 72. He says he can't --

13 MS. KAPLAN: No, 221.

14 MS. DUNN: Oh, I'm sorry, 221. I thought
15 Mr. Cantwell asked --

16 MR. CANTWELL: I am looking for the question number.
17 I know the juror number is 221.

18 MS. KAPLAN: I apologize.

19 MR. CANTWELL: You know, this is question 72 you're
20 referring to? We're talking about the same thing?

21 MS. DUNN: It's 61 and 72.

22 MR. CANTWELL: 61 and 72.

23 MS. DUNN: Correct.

24 MR. CANTWELL: All right. Well, if it's the A-fib
25 and high blood pressure, I don't know that these are --

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1 THE COURT: I don't think that's a big deal.

2 MR. CANTWELL: Question 72, the juror says: "I would
3 try. Very against protests and riots." I think probably most
4 people are against riots. And so if she has a preconceived
5 idea that riots are a bad idea, I think that's someone we could
6 probably work with.

7 MS. DUNN: Your Honor, I think the issue is if
8 somebody checks off no, that they couldn't put aside their
9 preconceived notions -- and I thought we had agreed on this on
10 an earlier case -- that they can't decide the case solely on
11 the evidence and the law as instructed by the Court, this is
12 not a juror that anybody here should want.

13 MR. SMITH: I don't think that, Your Honor. We
14 should at least inquire further to make sure those beliefs are
15 sincere and that they're not a product of not really
16 understanding what they're saying.

17 THE COURT: All right. The juror will not be excused
18 at this time.

19 MS. DUNN: Thank you, Your Honor.

20 THE COURT: How about number -- let me bring up one.
21 Number 224. "I have to get my kids off the bus. I do not have
22 child care. I live on" -- 224.

23 MS. DUNN: Your Honor, we would want to ask this
24 person more questions. They're 58 years old. And given the
25 standard that's been applied to other people in this case, we

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1 would not agree to excuse this person.

2 MR. CANTWELL: I'm sorry, which juror number?

3 MS. DUNN: 224.

4 MR. CANTWELL: You said 224 is 58 years old?

5 MS. DUNN: Oh, I apologize. I'm wrong about that.

6 Thank you, Mr. Cantwell.

7 But in any event, I think given the standard that's
8 been applied to other jurors that we have discussed, we would
9 request to ask this person more questions.

10 MR. SMITH: I'm fine with that, Your Honor.

11 THE COURT: This person does say are you a
12 healthcare -- look at 60. "I'm a medical assistant at an
13 urgent care. I have direct contact with positive" -- then she
14 has to get her kids off the bus.

15 All right. With no agreement on it, we will pass
16 224.

17 MS. DUNN: Your Honor, I think we were at juror 234.
18 Again, this is another questionnaire that seems like it's
19 trying to offer many cause bases. This person says that they
20 have an inability to concentrate because of COVID. They can't
21 abide by the Court rules because they refuse to wear a mask,
22 like the prior individual. And they say that they would have a
23 difficulty being impartial because they're sick of all of this.

24 MR. SMITH: They said they refuse to wear a mask?

25 MS. DUNN: Correct.

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1 MR. SMITH: Sorry, got to go. I don't have any
2 objection, Your Honor.

3 MR. CANTWELL: Isn't it -- I mean, my understanding
4 of where this is -- is just refusing to wear a mask, is that
5 something that is okay? I mean, can they do that?

6 THE COURT: Well, I'm going to order them to wear a
7 mask. If they don't wear a mask --

8 MR. CANTWELL: I don't want to strike this juror. I
9 want him in. I want to question him about his mask beliefs.

10 MR. SMITH: Fair enough.

11 MS. DUNN: Your Honor, this is very -- I mean, this
12 is -- earlier we all agreed if somebody refuses to wear a mask,
13 they would be excused.

14 MR. CANTWELL: We did not agree to that, actually,
15 Judge. What we agreed to is that man had COPD and had a
16 medical condition which prohibited him from wearing a mask, so
17 I was not going to interrogate him about his mask -- about his
18 medical condition.

19 If somebody says -- this is something that should be
20 familiar to everybody in this room by now. The mask issue has
21 become a politicized point. People resent it because they feel
22 like it's being imposed upon them by the Democratic party. So
23 this is going to result in a very favorable situation for the
24 plaintiffs, in which they will strike Republican after
25 Republican after Republican --

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1 THE COURT: Look, look, we don't need that.

2 MR. SMITH: Cantwell, do you know what else people
3 resent --

4 THE COURT: 234 is passed for the time, this time.

5 MS. DUNN: Your Honor, just for the record, let me
6 point out to Mr. Cantwell, this person says his wife has
7 Crohn's disease and her immune system is compromised. The odds
8 that this person makes it onto this jury is zero. We're just
9 trying to streamline the situation so we're not here till
10 Christmas.

11 MR. SMITH: Cantwell, does this sound like somebody
12 you want to force to sit on a jury for four weeks? They don't
13 sound like they're going to be very happy about the experience.
14 That's really not good for anybody.

15 MR. CANTWELL: Judge, my view of it is I think that
16 once we get people in here and question them about their mask
17 beliefs, I think in a lot of cases these things are going to
18 turn out to be less than sincere. They're making fashionable
19 political statements in their questionnaires --

20 THE COURT: Look at this man. He's got the wife with
21 whatever all of her problems are. There are people -- good
22 people and bad people that have things in their lives that have
23 nothing to do with how they behave in a particular situation.

24 MR. SMITH: Chris, if they're equivocal about the
25 masks, then we'll bring them in. This states very clearly, if

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1 they're bold enough to state right to the Court "I'm not going
2 to wear a mask even though you're ordering it," that's probably
3 a line we can draw and say, you know what? Let's just --
4 let's -- they'll be resentful if they're on the jury.

5 MR. CANTWELL: And if that turns out to be the case,
6 then he won't be on the jury. The issue here --

7 THE COURT: Okay. We'll take 15 or 20 minutes on
8 Monday to get to the same point we could get to today if -- you
9 know -- you know what the result is probably going to be on
10 this particular juror. But be that as it may, we'll bring him
11 in.

12 All right. Who is next?

13 MS. DUNN: All right. Juror Number 234 -- I
14 apologize. 235. And Your Honor, we might ask Mr. Cantwell to
15 reconsider on 234 given the obviousness, but we can let it go
16 for the moment and maybe return to it.

17 On Juror Number 235, he says COVID, high risk. "My
18 wife is a vulnerable person due to underlying medical
19 conditions and I provide direct care for her, cooking,
20 cleaning, driving her to appointments." Under COVID concerns
21 he says, "Because of my wife's medical conditions I would be
22 concerned about her coming into contact with someone who is a
23 carrier of the disease. On her doctors' advice we are not
24 vaccinated because of her conditions and my family's medical
25 history."

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1 MR. SMITH: I think we should bring him in. I don't
2 think that's sufficient.

3 THE COURT: Okay. We'll pass on 235.

4 MS. DUNN: Juror Number 237, I don't know Your
5 Honor's policy on these kinds of issues, but this person had
6 their knee replaced and can't sit or stand for very long, they
7 say.

8 So again, I just want to reiterate on the last two
9 jurors --

10 THE COURT: Well, we can -- on somebody like that, we
11 usually tell them they can -- in particular here, they're going
12 to be in the gallery. They can stand if they need to.

13 MS. DUNN: Understood, Your Honor.

14 MR. SMITH: Your Honor, I think we should probably
15 ask further questions about that. But if it's genuine, if it
16 seems genuine, I'm inclined to agree to excuse. But I don't
17 know yet. The description is a little vague. Like, when did
18 it happen exactly? How long has it been? It's possible that
19 the person might be sort of using it as an excuse, even though
20 they had the procedure several years ago, for example.

21 MS. DUNN: Your Honor, I apologize. This person -- I
22 misread the questionnaire. Thank you to Mr. Bloch. His knee
23 replacement is scheduled for during this trial. So
24 November 17th, 2021.

25 MR. CANTWELL: What page is that? I'm sorry.

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1 MS. DUNN: Excuse me?

2 MR. CANTWELL: What page or answer to what number
3 question? It's Juror 237, right?

4 MS. DUNN: Correct, Juror 237, Question 6.

5 THE COURT: On Question 6, she says total knee left
6 replacement will be November 17th, '21.

7 MR. SMITH: Cantwell, can you tell me what reason we
8 would want to keep this person on the jury? I don't have them
9 in front of me. Do you see anything? Look for Fox News.

10 MR. CANTWELL: It fits the pattern of everybody
11 they're trying to strike.

12 THE COURT: Well, that's the nature of the thing.
13 You will get to try to strike everybody that they would not
14 want you to strike. But this lady has surgery set for
15 November 17th and it's to correct a condition that's going to
16 be uncomfortable for her to be on the jury.

17 MR. CANTWELL: And I'm about to agree with you that
18 he -- this person has -- I'm sorry, she has an appointment for
19 11/17. The trial is scheduled for November 19th. I think that
20 that is actually a good reason to strike a juror. And so, like
21 several other jurors that they've attempted to strike, I'm
22 perfectly okay with this one because there is an actual reason.

23 THE COURT: All right. We'll strike --

24 MR. SMITH: No objection.

25 THE COURT: -- 237.

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1 MS. DUNN: Your Honor, at this point I must say on
2 the record that we have not moved to strike for cause --

3 THE COURT: Wait a minute. I don't think it's
4 necessary to answer everything because the record of this trial
5 is not -- no one is going to care after today what's said here.
6 I mean, as far as -- I mean, legal objections could go to the
7 Fourth Circuit. But I don't think you have to answer every
8 perceived slight or insult.

9 Go ahead.

10 MS. DUNN: I appreciate that, Your Honor.

11 If you would turn, please, to Juror 254. 254, we do
12 have -- we have a number of bases for cause. This is the kind
13 of questionnaire where this person is not going to make it onto
14 the jury. We think it is highly inappropriate to seat somebody
15 on this jury who says they're unable to follow these
16 instructions and say "these people are only in it for the
17 attention and the money."

18 There are numerous other disqualifying features of
19 this questionnaire, but that --

20 MR. SMITH: What number?

21 MS. DUNN: I would hope we could all agree that
22 someone who in their questionnaire says "I can't follow the
23 Court's instructions because these people are only in it for
24 attention and money" should be removed for cause.

25 MR. SMITH: Your Honor, what number is this?

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1 MS. DUNN: 254.

2 MR. CANTWELL: And what question number are you
3 referencing?

4 MS. DUNN: 70.

5 MR. SMITH: So he or she said -- she can't -- tell me
6 that one more time. I'd really like to hear that just once
7 again, if you don't mind.

8 MR. CANTWELL: Question 70. Under the law, the facts
9 at issue in the trial or for the jury to determine the law
10 applicable to the allegations is something on which you will
11 be -- the Court will instruct you.

12 This is the question you're referencing, right?

13 MS. DUNN: I have to --

14 MR. CANTWELL: It's Question 70. The answer is:
15 "Honestly, these people are only in it for the" -- something
16 "and money."

17 THE COURT: "Attention and money."

18 MR. CANTWELL: "Attention and money."

19 MR. SMITH: Did they specify who they mean by "those
20 people"?

21 MS. DUNN: Sorry. Your Honor, the question is:
22 "Would you have any difficulty following the instructions if it
23 was at odds with your own views of what the law should be?"
24 And they check "Yes." "Honestly, these people are only in it
25 attention and money."

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1 MR. SMITH: We'd like to inquire further, Your Honor.
2 I don't know if those beliefs are really sincere yet.

3 MR. CANTWELL: And --

4 THE COURT: Wait. Let me hear from Mr. Smith.
5 Mr. Smith --

6 MR. SMITH: Of course, Your Honor. I said I'd like
7 to inquire further. I'm not sure if those beliefs are sincere
8 yet. I'd like to sort of question them about that and see what
9 they might really mean.

10 THE COURT: Do you object -- are you objecting to
11 striking the juror at this time?

12 MR. SMITH: Well, Your Honor, I'm not sure. I know
13 that we're on Juror 254, and they have -- I'm sorry -- the
14 plaintiffs have suggested that this juror be excused. I don't
15 think that -- I'm not quite ready to excuse them yet. I'd like
16 to inquire a little further of them.

17 So, yes, I think that we should -- I think Your Honor
18 was saying pass. We should pass on them and come back to them.

19 THE COURT: All right. We'll pass.

20 MS. DUNN: Your Honor, we strenuously object. This
21 person has said -- has already prejudged the plaintiffs in this
22 case and has said they can't follow --

23 THE COURT: I'm not saying the juror will not be
24 stricken for cause.

25 MS. DUNN: Okay. That's helpful to understand. So

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1 jurors that we pass on may still be struck for cause?

2 THE COURT: Of course.

3 MS. DUNN: Great. Okay.

4 THE COURT: I mean, this is just hopeful to get rid
5 of the obvious ones that -- I mean, even though there are
6 jurors in here who obviously can't -- are for your side and
7 can't -- wouldn't go the other way for anything they say, but
8 sometimes, you know, people get in and -- and of course on the
9 opposite side. There are people when they get here, they take
10 the oath and they --

11 MR. SMITH: There are people who see a question like
12 that as a golden ticket to getting out of jury duty and they'll
13 just put "yes" because they think that it will be an automatic
14 excuse.

15 THE COURT: There are things -- some of these people
16 are beyond redemption insofar as being rehabilitated to be a
17 juror.

18 MS. DUNN: Thank you, Your Honor.

19 THE COURT: Let's take a break now for about
20 ten minutes and we'll come back.

21 (Recess.)

22 THE COURT: Why don't we switch horses a minute? And
23 I'll let the defendants bring up any jurors that the defendant
24 wishes to bring up at this time.

25 MR. CANTWELL: Judge, for me personally, this is the

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1 first time I've ever seen these documents. I'd like to spend
2 some time with them.

3 THE COURT: Well, obviously you don't have any.
4 Mr. Smith might, or some of the others.

5 MR. SMITH: Your Honor, I haven't had an opportunity
6 to access the questionnaires yet, either. I know that Heidi
7 and I emailed about that earlier at the end of the day
8 yesterday. And I haven't had access to them yet, but I will
9 have a list for the Court on Monday morning so that we have
10 them ready to go through at least. I'm sorry I don't have
11 anything right now.

12 THE COURT: Well, if you have any -- if you have
13 anyone, you might send the names to plaintiffs' counsel.

14 MR. SMITH: Oh, sure.

15 THE COURT: And if the plaintiffs -- if you both
16 agree, then you can let us know, let the Court know, and we can
17 stop the jurors.

18 MR. SMITH: Of course, Your Honor. That sounds good.
19 I will do that. Absolutely. Thank you.

20 THE COURT: Any of the *pro se* defendants have any
21 questionnaires they wish to bring up?

22 MR. CANTWELL: Not yet, Judge.

23 THE COURT: Okay. Well, we'll go back to the
24 plaintiff.

25 MR. KOLENICH: Your Honor, Jim Kolenich for Defendant

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1 Kessler. If it's defendants' turn, I'd like to bring up a few.

2 THE COURT: Did you say you have no --

3 MR. KOLENICH: I have one or two questionnaires I'd
4 like to bring to the Court's attention this morning.

5 THE COURT: Okay. You may.

6 MR. KOLENICH: Thank you, Judge.

7 Juror 186, the questionnaire states they were present
8 at the event, they were a counterprotester, and that they are a
9 personal friend of the Wispelwey family.

10 THE COURT: All right. Does the plaintiff have any
11 objection to excusing that juror?

12 MS. DUNN: Your Honor, we would like to talk to this
13 person. We looked into the law in the Fourth Circuit and this
14 wouldn't be basis for cause, but we're happy to just have a
15 conversation with this juror when he gets here.

16 THE COURT: All right. We'll pass that juror.

17 MR. KOLENICH: Thank you, Your Honor.

18 Juror Number 314 is a financial donor to Black Lives
19 Matter and states they cannot be impartial.

20 MR. SMITH: Which number is that, Jim?

21 MR. KOLENICH: 314.

22 THE COURT: All right. Does the plaintiff object to
23 that?

24 MS. DUNN: Your Honor, we do think that because we
25 passed over so many people who said they could not be

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1 impartial, we think we need to pass over this individual as
2 well.

3 MR. CANTWELL: I'd just also point out that she says
4 she has a doctor's appointment on November 9th, which is during
5 the trial.

6 MR. SMITH: Your Honor, we'd obviously want to
7 ultimately challenge them for cause, but if the plaintiffs want
8 to call them in to ask them questions, I have no problem with
9 that.

10 THE COURT: Okay. She didn't ask to be excused, did
11 she? We'll bring her in.

12 MR. KOLENICH: Thank you, Your Honor. The remainder
13 of mine would have been for asserted impartiality that, as
14 plaintiffs pointed out, we passed on previously today. So,
15 since my co-defendants seem to want to bring in everybody under
16 the sun for questioning on Monday, that's all I have.

17 MR. SMITH: I feel like those -- you know, "Can you
18 be impartial in this case?" I don't know. Sometimes those are
19 the golden ticket questions, like, real easy out for people.
20 Sometimes it's good to just get into that a little further.

21 THE COURT: Okay. I'll ask the plaintiff if you have
22 any others that you think there's any -- worthwhile going into
23 for cause.

24 MS. DUNN: We do, Your Honor.

25 MR. SMITH: While nobody is talking, David Campbell,

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1 I sent you a Zoom message on the chat, just so you know. I
2 didn't know if you saw it or not. But it's there.

3 Sorry about that, Your Honor.

4 THE COURT: What did he say?

5 MR. SMITH: I'm just telling Attorney Campbell that I
6 sent him a Zoom message in the chat, the remote chat. I don't
7 know if he saw it or not.

8 THE COURT: All right.

9 MS. DUNN: Thank you, Your Honor.

10 Juror Number 268 says they would be moderately
11 concerned in returning an acquittal for fear of repercussions
12 on behalf of the plaintiffs or their sympathizers. We would
13 ask that this person who would fear reprisal, if it would
14 impede their ability to decide the case, be excused.

15 MR. SMITH: Your Honor, we'd like to bring them in
16 for questioning a little further on that. They may not realize
17 that the jury is anonymous.

18 THE COURT: Okay. We'll pass on that one.

19 MS. DUNN: Your Honor, Juror Number 280 says they
20 have extreme trouble understanding the questionnaire and
21 trouble with the English language. Separately, they say they
22 couldn't solely consider courtroom evidence. But we think
23 that, you know, having trouble with English and not being able
24 to understand the questionnaire is cause.

25 MR. SMITH: We have no objection to that, Your Honor.

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1 THE COURT: All right. Any objection?

2 MR. SMITH: Josh Smith.

3 THE COURT: Okay. We'll excuse 280.

4 MS. DUNN: Your Honor, Juror 281 has some very
5 extreme statements in this questionnaire.

6 73, he writes: "I expect this case to be an example
7 of a kangaroo court case. I'm unconvinced the defendants will
8 be treated or sentenced fairly." He goes on, but he uses the
9 phrase "kangaroo court" and "rigged jury" numerous times.

10 I think this is -- he writes a fairly long
11 explanation about -- about the kangaroo court.

12 MR. CANTWELL: Well, we have the chance to prove him
13 wrong, then. I object to striking the juror.

14 THE COURT: All right. We'll pass.

15 MS. DUNN: Your Honor, Juror 282 says she's the only
16 assistant to a solo surgery practice and that her boss needs to
17 take off when she takes off.

18 MR. SMITH: Which number is this again?

19 MR. CANTWELL: This is 282. I have no objection to
20 it.

21 MR. SMITH: No objection, Your Honor.

22 THE COURT: All right. We'll excuse 282.

23 MS. DUNN: Your Honor, Juror 283, again, is a
24 questionnaire that raises so many objections it's hard to
25 believe this person would ever sit on a jury, but the basis for

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1 cause is answer 70. She says she would be unable to follow the
2 Court's instructions because depending -- "some laws, I
3 believe, are outdated and should be changed." So again, we'd
4 have a jury nullification issue with this.

5 MR. CANTWELL: No objection from me.

6 MR. SMITH: No objection, Your Honor.

7 THE COURT: All right. Excuse 283.

8 MS. DUNN: 289, there are a couple of bases for
9 cause. One is -- we discussed earlier, and I think defendants
10 agreed to this -- people who say -- are categorical they don't
11 wear masks and are not vaccinated should be excused.

12 This person also has trouble with English; has
13 trouble reading, he says.

14 MR. CANTWELL: I'm not sure that we agreed to what --

15 MR. SMITH: He says he doesn't wear a mask, or
16 wouldn't wear a mask?

17 MS. DUNN: He says "I am not vaccinated" and doesn't
18 wear a mask.

19 MR. SMITH: That doesn't bother me.

20 MR. CANTWELL: It's a fashionable political statement
21 on the right these days. I object to striking the juror.

22 MR. SMITH: We also object, Your Honor.

23 THE COURT: All right. Pass 289.

24 MS. DUNN: Your Honor, Juror 310 says he only has one
25 kidney and has extreme COVID concerns. He says, "Other than go

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1 to work, I stay home and away from gatherings and do not feel
2 comfortable in a room with people I don't know and all the
3 people in their household. This sort of setting is where COVID
4 spreads. All the people in the courtroom, an indoor setting,
5 is where COVID spreads."

6 MR. SMITH: Not with this mask rule. No way. Not
7 with the Court's mask order. I don't believe that COVID will
8 be spreading here. So let's bring him in. There was someone
9 else who had very similar comments and we said we wanted to
10 question them further.

11 THE COURT: All right. We'll pass 310.

12 MS. DUNN: Your Honor, Juror 316 has two issues. And
13 his medical issue -- her medical issue is I believe distinct
14 from some of these others. This person has Crohn's disease,
15 which is very -- a very difficult disease -- and also has an
16 economic problem, which is she says, "I own my own company and
17 can't be away from it this long."

18 MR. CANTWELL: I'm sorry, I just don't -- if anybody
19 cares to inform me, what is Crohn's disease?

20 MR. SMITH: It's an autoimmune disease, Chris.

21 MS. KAPLAN: It's one of the worst of the autoimmune
22 diseases like rheumatoid arthritis, etc., but Crohn's affects
23 your inner organs.

24 MR. CANTWELL: No objection.

25 MR. SMITH: It's pretty painful, Chris.

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1 No objection, Your Honor.

2 THE COURT: She's excused, 316.

3 MS. DUNN: Your Honor, Juror 319, also health issues
4 that she flags. She says, "I had major back surgery. My
5 healing time is six months. I'm on pain medication every day.
6 I have to stay home." Then she flags herself as COVID high
7 risk due to blood clots on lungs from her surgery.

8 MR. CANTWELL: No objection.

9 MR. SMITH: No objection, Your Honor.

10 THE COURT: All right. Excused, 319.

11 MS. DUNN: Juror Number 331, Your Honor, also flags
12 himself as COVID high risk. He says he had COVID-19, which
13 causes brain fog. In addition, he's concerned about his wife.
14 But it's a pretty standard cause basis to have a brain issue
15 that you can't -- makes you believe you can't focus on the
16 evidence.

17 MR. CANTWELL: Sorry, just a second.

18 MR. SMITH: Did you say brain fog?

19 MS. DUNN: Correct.

20 MR. SMITH: Is that a thing?

21 MR. CANTWELL: 331, you said?

22 MS. DUNN: Yes, Mr. Cantwell.

23 MR. SPENCER: What is the cause of his ailment?
24 Brain fog seems to be a casual word of: I have difficulty
25 concentrating.

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1 MS. DUNN: Your Honor, this individual had COVID, and
2 that's what's caused his brain fog, according to his
3 questionnaire.

4 MR. SPENCER: So it's long COVID.

5 MR. SMITH: We can bring him in, I think.

6 THE COURT: All right. Pass 331.

7 MS. DUNN: Your Honor, Juror 354 says she can't
8 decide the case on the evidence because she doesn't trust
9 anyone and that the judicial system is corrupt because of this
10 questionnaire.

11 THE COURT: Yes, she was very interesting.

12 MS. DUNN: There are many -- excuse me. Your Honor,
13 there are many, many, other comments in the questionnaire that
14 I'm not reading out loud, but are of a similar vein.

15 MR. SMITH: She said because of the questionnaire the
16 courts are corrupt?

17 THE COURT: She said the court system was corrupt, as
18 I recall, because she had to answer the questionnaire. But she
19 had a lot of other issues, too.

20 MR. CANTWELL: I object to striking the juror.

21 THE COURT: All right. We'll pass her.

22 MR. SPENCER: I don't object, just for the record.

23 THE COURT: What was that?

24 MR. SPENCER: I don't object to striking jurors who
25 are flagrantly attempting to disrespect the Court and the

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1 process, just for the record.

2 THE COURT: All right. Thank you.

3 MS. DUNN: Your Honor, Juror 376, there are two
4 issues that I would think we might be able to agree upon, which
5 is she is the only income and caregiver to a special needs
6 child. She says four weeks would not be financially feasible
7 for her. She also has an autoimmune disease and she says she's
8 a caregiver with CP plus epilepsy and she's very high risk.

9 MR. CANTWELL: No objection.

10 MR. SMITH: No objection, Your Honor.

11 MR. SPENCER: That seems reasonable.

12 THE COURT: Repeat the number.

13 MS. DUNN: Thank you, Your Honor. Juror 376.

14 THE COURT: 376 will be excused.

15 MS. DUNN: Your Honor, Juror 386, similar to the
16 nurse of the beginning of this hearing, this person says he
17 works at a hospital admission unit which is considered to be in
18 quarantine constantly while accepting new admissions per VDH
19 guidelines. His wife in primary care at a hospital is in
20 contact with new admissions. He's concerned about being away
21 from work because patient care demands are high and hospital
22 staffing is in crisis. No one can easily do his job for four
23 weeks. We think that's obvious cause.

24 MR. CANTWELL: I think that most people would
25 consider it pretty troublesome to be away from work for four

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1 weeks, right?

2 THE COURT: Well, but this hurts the community for
3 this person to be away, a medical --

4 MR. SMITH: Remember, Chris, there's only going to be
5 12 ultimately we select.

6 MR. CANTWELL: I get that. Can you point me -- his
7 position is somehow -- what was his exact position? I'm sorry.

8 MS. DUNN: Are you addressing me, Mr. Cantwell?

9 MR. CANTWELL: I'm sorry.

10 THE COURT: Continue to address the Court. What was
11 the medical --

12 MS. DUNN: He works at a hospital where he says the
13 staffing is in crisis. He's in the hospital admissions unit
14 which is in quarantine constantly. So --

15 THE COURT: I mean, that's -- I mean, if he comes in
16 here and tells me that and I believe him, I'm going to excuse
17 him because of the crisis we're having and the demand.

18 MR. SMITH: That's fine, Your Honor.

19 MR. CANTWELL: Then I guess that settles it.

20 MR. SMITH: I don't have any objection, Your Honor.

21 THE COURT: Then we'll excuse that juror.

22 MS. DUNN: Your Honor, if I may have a moment just to
23 confer with my colleagues, make sure we didn't miss anything.

24 THE COURT: You may.

25 MR. CAMPBELL: Your Honor, this is Dave Campbell for

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1 Defendant Fields. What was the number of the last juror
2 excused? I apologize.

3 THE COURT: What was the number?

4 MR. CANTWELL: 386, Judge.

5 THE COURT: 386.

6 MR. CAMPBELL: Thank you. And I do have a couple to
7 bring up, Your Honor, whenever plaintiffs' counsel are done.

8 THE COURT: All right.

9 MS. DUNN: Your Honor, we'll be happy to pass.

10 THE COURT: Go ahead.

11 MR. CAMPBELL: Thank you, Your Honor. Dave Campbell
12 for Mr. Fields.

13 Juror Number 303, in response to number 42 and 43,
14 thinks Unite the Right stirred up and instigated violence, but
15 more importantly, number 73, "daughter was a friend of Heather
16 Heyer and attended vigil on the Downtown Mall."

17 I would -- with Mr. Fields being a defendant in the
18 case, I would think that's cause, Judge.

19 MR. SMITH: I agree, Judge. That sounds like cause
20 to me.

21 THE COURT: Any objection?

22 MS. DUNN: Your Honor, given the standard that's been
23 applied, we would like to talk to this person. Heather Heyer
24 is not a party.

25 THE COURT: Well, the prospect is very dim of being

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1 rehabilitated.

2 MS. DUNN: Your Honor, we understand.

3 THE COURT: Wait --

4 MR. SMITH: Sorry.

5 THE COURT: It's -- we're not -- I mean, I don't care
6 what you say or what he says, that's not going to determine.
7 The fact that you all think he's unfair, he thinks you're
8 unfair, so be it. It doesn't make any difference. When the
9 issue is presented to me, I'm not going to care which one of
10 you were fair. I'm going to look at what the witness says and
11 decide it.

12 Now, intelligently, you all can look at this thing
13 and say am I likely to have -- be correct if I excuse this
14 juror? I mean, I can understand that you think it would be
15 error for me to strike the juror, but don't bring somebody in
16 here just so we can be -- hear his prospective jurors say why
17 they're for them and yours can counter.

18 It just seems to me that anyone obvious is probably
19 going to be struck. And I would think that would be a very
20 hard -- hard thing for this gentleman to be very sympathetic to
21 Mr. Fields.

22 MS. DUNN: Your Honor, we understand. We consent.

23 THE COURT: Okay. Do you object to 303 being
24 excused?

25 MS. DUNN: No, we do not object.

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1 THE COURT: Okay. 303 is excused.

2 MR. CAMPBELL: Thank you, Your Honor. And thank you,
3 Counsel.

4 Your Honor, I would point to, Number 269 on the jury
5 questionnaire responded that: "Yes, it would be difficult to
6 be fair to both sides. Additionally, worried because of COVID
7 to be in a crowded room," and then wrote, "anybody involved is
8 guilty." So for those reasons, would ask the Court to strike
9 269 for cause.

10 THE COURT: Any objection?

11 MS. DUNN: Your Honor, on this we do object because
12 we raised precisely the same objections and were passed over.
13 We would like to talk to this person.

14 MR. SMITH: I don't have a problem with that, Your
15 Honor.

16 THE COURT: All right. Pass 269.

17 MR. CAMPBELL: Your Honor, I would also raise Juror
18 Number 250. In response to question 43 indicate they can't be
19 fair and find actions of these individuals heinous and perceive
20 them as guilty. Then number 73, find them guilty.

21 I certainly understand plaintiffs' position as it
22 relates to some other defendants' position on their reasons,
23 but I would just ask the Court for Number 250 to remove for
24 cause.

25 THE COURT: All right.

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1 MS. DUNN: Your Honor, truly, we raised the same
2 objections and defendants objected. So I do feel like we need
3 to be even-handed in this.

4 MR. SMITH: No problem, Your Honor. We have no
5 problem with that.

6 THE COURT: Pass 250.

7 MR. CAMPBELL: Last one, Judge. Number 186. I think
8 this is a little bit different because this person actually
9 hones directly in on the case in their responses. In response
10 to number 43, indicates he holds deep regret and sorrow for
11 what Unite the Right did to his community. He holds alt-right
12 organizers responsible for the death of Heather Heyer.
13 Further, he works with Seth Wispelwey's father, one of the
14 plaintiffs in this case, and has heard him lecture on the
15 effects of the incident on his son. So, Judge, I think
16 Number 186 I would ask the Court to strike for cause.

17 MR. SMITH: That sounds pretty -- that sounds pretty
18 substantial, Your Honor. I definitely agree with that.

19 THE COURT: Any objection to 186?

20 MS. DUNN: Your Honor, same objection as before.
21 These are all --

22 MR. SMITH: I don't know. I'm not sure. This one
23 is -- there is like -- this one is like he's really close to a
24 lot of this case. I mean, come on. He put on -- who is that?

25 THE COURT: Excuse me. I want to hear from

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1 plaintiffs' counsel.

2 MS. DUNN: Your Honor, I apologize. Thank you to
3 Mr. Bloch. We already discussed 186. And Your Honor already
4 decided to pass him over because under the Fourth Circuit law
5 this does not meet the standard. So we already -- we already
6 considered Juror 186.

7 MR. CAMPBELL: My apologies, Judge. That's the last
8 one I have.

9 THE COURT: You object to striking 186, am I correct?

10 MS. DUNN: Yes, Your Honor.

11 THE COURT: All right. Any others? Anyone else?

12 MR. SMITH: I just wanted to confirm, David, that was
13 186, the last one, one-eight-six?

14 MR. CAMPBELL: It was.

15 MR. SMITH: Thank you.

16 MR. CAMPBELL: Sorry about that.

17 THE COURT: All right. Are there any -- does the
18 plaintiff have any motions that need to be heard this morning?

19 MS. DUNN: Your Honor, there are outstanding motions.
20 I should probably confer with co-counsel to see which of the
21 motions need to be brought up affirmatively, if any, or whether
22 we should just flag these for the Court. So with the Court's
23 indulgence, if I may have a moment to do that.

24 (Pause.)

25 THE COURT: All right.

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1 MS. DUNN: Your Honor, there are two motions that
2 we've brought affirmatively that if the Court would like to do
3 it today, we would be available and prepared to argue.

4 THE COURT: All right.

5 MS. DUNN: One is a motion that we brought seeking
6 modification of Judge Hoppe's order related to Defendant
7 Fields. And Mr. Tolentino is here and can handle that motion.
8 The second motion is we brought a motion to preclude
9 witness Daryl Davis, who is being proposed as a witness related
10 to Mr. Schoep's deradicalization. And Ms. Hiromi, who is on
11 the Zoom, is prepared to argue that. So if the Court would
12 like to do either, we are prepared to do those.

13 THE COURT: On the second motion, who for the
14 defendant is here to argue that? Anyone? Is there anyone for
15 the defendant on that latter motion regarding Mr. Davis?

16 MS. HIROMI: Your Honor, Mr. ReBrook was on earlier,
17 but appears to have dropped off.

18 Mr. ReBrook, who proposed Mr. Davis, was on the Zoom
19 earlier, but he appears to have since dropped off. I'm not
20 seeing him on the participants list at the moment.

21 THE COURT: I'm sorry, are you counsel?

22 MS. HIROMI: Yes. This is Makiko Hiromi from Paul
23 Weiss for plaintiffs.

24 THE COURT: All right. We'll take up the first
25 motion first.

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1 MS. DUNN: Your Honor, Mr. Tolentino will be handling
2 the first motion.

3 MR. TOLENTINO: Your Honor, is it okay if I stand at
4 this podium, Judge?

5 MR. CAMPBELL: Your Honor, this is Dave Campbell.
6 I'm not certain I'm prepared to respond to this motion, but I
7 can try my best if the Court wants to go ahead.

8 THE COURT: Well, I'd like to go ahead and get it on
9 the floor. And you can tell me if you need more time to
10 respond.

11 MR. CAMPBELL: Yes, Your Honor. Thank you, Judge.

12 MR. TOLENTINO: Your Honor, if I may proceed. Ray
13 Tolentino on behalf of the plaintiffs.

14 We filed a motion to modify Judge Hoppe's order
15 granting in part our sanctions motion against Defendant James
16 Fields. For the Court's reference, our motion is at ECF 1266
17 and the underlying order is ECF 1237. Mr. Campbell hasn't
18 filed an opposition and we haven't received one from the other
19 side, just to sort of set the landscape.

20 We asked for two discrete modifications to Judge
21 Hoppe's order. The first pertains to whether Mr. Fields can
22 testify at trial. Judge Hoppe correctly determined that as a
23 result of Mr. Fields's refusal to testify at his duly noticed
24 deposition, that he should be prohibited from testifying in his
25 own defense. He held in particular that the discovery

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1 misconduct, quote, "had the practical effect of keeping
2 plaintiffs in the dark about what he knew, what he did, and
3 what he would testify if called to the stand."

4 But Judge Hoppe left it to Your Honor to decide
5 whether Mr. Fields should also be prohibited from testifying on
6 behalf of any other parties, including his co-defendants.

7 Respectfully, Your Honor, we think that there is no
8 question that Mr. Fields should be prohibited from testifying
9 on behalf of his co-defendants. And as we explained in our
10 briefs, that's so for two reasons.

11 The first is that Judge Hoppe's reasoning applies
12 with equal force to the question that Your Honor has before
13 you, which is can he testify on behalf of his co-defendants?
14 The answer is unambiguously no because doing so would enable
15 him to avoid the sanctions order Judge Hoppe imposed, which is
16 when you don't testify at your deposition, you can't testify at
17 trial.

18 And the second reason is allowing him to testify, if
19 called by his co-defendants, would effectively be allowing him
20 to testify in his own defense. So it would effectively render
21 nugatory the sanctions that Judge Hoppe imposed on him, and it
22 would just make no sense and be internally inconsistent if Your
23 Honor were to allow his co-defendants to call him to the stand.
24 And that's particularly true and particularly dangerous in a
25 conspiracy case where any testimony that could be elicited by

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1 the co-defendants would redound to the benefit of Mr. Fields
2 himself.

3 So our position is a fairly modest one, which is to
4 extend Judge Hoppe's order and prohibition all the way to
5 prohibit him from testifying not only in his own defense, but
6 also if called by his co-defendants.

7 And if Your Honor would indulge us, if you agree with
8 us that he's not allowed to testify at trial, we would also
9 propose -- and we propose in our brief -- a jury instruction to
10 explain his absence, that the reason he's not testifying is
11 because he engaged in blatant discovery misconduct and repeated
12 refusals to sit for a deposition, and that's why he's not here.

13 So that's the first modification, Your Honor. And
14 I'm happy to answer any questions about that before turning to
15 the second.

16 THE COURT: What is the second?

17 MR. TOLENTINO: So the second modification, Your
18 Honor, is that -- it has to do with Judge Hoppe's ruling on the
19 Fifth Amendment invocations and the adverse inferences that we
20 proposed with respect to those invocations.

21 So Judge Hoppe acknowledged in his order that
22 narrowly tailored adverse inference instructions were a proper
23 remedy for Mr. Fields's invocation of his Fifth Amendment right
24 against self-incrimination. And so consistent with that
25 guidance, we have narrowed and proposed adverse inferences that

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1 are directly tethered to the requests for admissions that he
2 refused to answer. And of the many, many RFAs that we had
3 proposed, we've actually pared it down to sort of four key RFAs
4 that we've explained and set forth on page 9 of our brief. And
5 I'm happy to walk through those, but Your Honor has the
6 proposals before -- they're before you in our brief.

7 So just a couple of points to make with respect to
8 that, which is under the governing case law, that type of
9 modest proposal has routinely been accepted by courts. Those
10 types of modifications have routinely been granted so long as
11 they're narrowly tailored and uniquely connected to the RFAs.
12 Which if you look at the text of our proposed adverse inference
13 instructions, they certainly are here. And they're not
14 unfairly prejudicial in any respect or confusing or
15 inflammatory.

16 So for those reasons and those set forth in our
17 brief, Your Honor, we'd ask that you make -- Your Honor make
18 those two modifications to Judge Hoppe's order. Happy to
19 answer the Court's questions.

20 THE COURT: All right. No questions.

21 What's your position, sir?

22 MR. CAMPBELL: Thank you, your Honor. Dave Campbell
23 for Mr. Fields.

24 I don't oppose the first part of the motion. I agree
25 it would be internally inconsistent to permit Mr. Fields to

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1 testify if called by a co-defendant. I don't think the
2 instruction is necessary to the jury to pile on. The sanction
3 that Judge Hoppe granted is not testifying. So I think that's
4 sufficient, but I don't oppose the Court indicating that that
5 stands for anyone.

6 The second one, Judge, I really would ask the Court
7 for some more time to respond. I have not seen the four RFAs
8 and I'm concerned they may contradict the text of Judge
9 Hoppe's -- the rest of his order largely denied many of the
10 sanctions sought by counsel. So I would ask the Court for some
11 more time to look at those RFAs, and I can provide the Court a
12 written response this afternoon.

13 THE COURT: Okay. Well, I'll give you time till --
14 Monday will be okay. I won't be looking at it this afternoon.
15 But Mr. Fields, if he's called, won't be until the defendants'
16 case. So we've got a few days before. But I would say --

17 MR. SMITH: Yes, sir, Your Honor.

18 THE COURT: I would say that -- yes?

19 MR. SMITH: My understanding is the plaintiffs were
20 planning on calling most or all of the defense witnesses
21 adversely during their case in chief.

22 MS. DUNN: Your Honor?

23 THE COURT: Yes.

24 MS. DUNN: We don't intend to call Mr. Fields because
25 our position is that, because he was not deposed, he should not

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1 testify.

2 THE COURT: All right.

3 They don't plan to call Mr. Fields.

4 MR. SMITH: Thanks, Your Honor.

5 THE COURT: Okay. Mr. Campbell, how about having
6 that brief to us by Sunday, okay?

7 MR. CAMPBELL: Yes, sir. No problem. I anticipate
8 it will go out this afternoon, regardless of the Court's time.

9 THE COURT: Fine. Thank you.

10 With regard to the second motion, is the person who
11 is going to argue that back? I didn't understand.

12 MS. DUNN: Your Honor, the person who is going to
13 argue it is here, but the person who is needed to respond to
14 it, we believe --

15 THE COURT: No, I meant for the defendant. Is the
16 person who was going to respond to the Davis --

17 THE CLERK: He's dropped off the Zoom call and we
18 were trying to get him back on, Your Honor.

19 MR. SMITH: That's ReBrook, isn't it? I can try to
20 call him. I'll try to get him on the phone, Your Honor, and
21 see where he is.

22 THE COURT: Has he filed an opposition to the motion?

23 MR. SMITH: Yes, Your Honor, I think that he has.
24 He's calling back right now. I just got on the phone with him.
25 He's calling in right now. I don't think he realized that he

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1 dropped off.

2 That sounds weird now that I say it, but -- well, I'm
3 not saying that he wasn't listening or anything. He's calling
4 back in. So that's good.

5 I don't know what the deal is.

6 ReBrook, you're on.

7 MR. ReBROOK: Oh. Thank you. My phone died. Now
8 I'm back on.

9 THE COURT: Okay. Plaintiff is going to argue the
10 motion, and you may respond after plaintiff completes their
11 argument. All right?

12 MS. HIROMI: Thank you, Your Honor.

13 Plaintiffs move to exclude the testimony of Mr. Davis
14 because he has no relevant or admissible evidence or testimony
15 that he can provide.

16 We note that plaintiffs could have moved to preclude
17 Mr. Davis earlier based purely on his late disclosure.
18 Mr. Davis was placed on Mr. Schoep's witness list on
19 September 22nd, which was more than two weeks after the witness
20 lists were due. Counsel for Mr. Schoep has noted that the
21 disclosure was delayed because counsel only became a lawyer of
22 Mr. Davis a day before the supplemental -- or, excuse me,
23 amended disclosure was provided to us.

24 But whether the attorney knew of Mr. Davis is
25 irrelevant. Mr. Schoep, the party in question, clearly knew of

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1 Mr. Davis for years. He has worked very close with him for a
2 number of years. And, in fact, Mr. Davis testified at his
3 deposition that Mr. Schoep approached him as early as
4 six months ago with respect to participating in the case in
5 some way.

6 This Court has previously found in *Scott v. Clarke*
7 that it would be unfair to require a party to divert time and
8 resources away from preparing for a trial to depose witnesses
9 even two months before trial. And in this case, a disclosure
10 was made a mere month before trial; however, despite the lack
11 of time, plaintiffs went out of our way to accommodate
12 Mr. Schoep by attempting to depose Davis so that we could
13 potentially agree to his testifying. However, once we deposed
14 Mr. Davis, it became clear to us that he had no admissible or
15 relevant evidence to provide.

16 To the extent that Mr. Schoep has argued that our
17 motion in limine to preclude Mr. Davis is late and therefore
18 should be denied, plaintiffs believe that we should not be
19 penalized for attempting to accommodate the defendant in this
20 case and allow his witness to testify.

21 As we noted, based on Mr. Davis's deposition, he has
22 no relevant testimony to offer in this matter. Counsel for
23 Mr. Schoep has suggested that we are seeking to preclude his
24 testimony because we would like to exclude any testimony
25 suggesting that Mr. Schoep is a violent -- sorry, is not a

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1 violent white supremacist, but that is not our position.

2 Mr. Schoep is free to testify as to his own state of
3 mind during the time leading up to and during the events in
4 question; however, counsel for Mr. Schoep has acknowledged that
5 he does not intend to call Mr. Davis to speak about Unite the
6 Right in any capacity. Instead, his testimony would be limited
7 to Mr. Schoep's state of mind.

8 The state of mind can be broken up into two time
9 periods. One is 2016 and 2017, in the time period leading up
10 to and at Unite the Right, but Mr. Davis lacks any foundation
11 to testify as to Mr. Schoep's state of mind during this time
12 period.

13 Mr. Davis and Mr. Schoep interacted during one
14 meeting in 2016, where he met Mr. Schoep for a documentary film
15 that was being filmed and they spoke for approximately one
16 hour. A one-hour conversation in 2016 is certainly not
17 sufficient foundation to testify as a lay witness for --

18 THE COURT: Well, what -- he's testifying to his
19 state of mind after the incident. I mean, I'd like to ask --
20 why don't we maybe short-circuit this and ask defense counsel:
21 Why is that relevant?

22 MR. ReBROOK: Your Honor, I believe it's relevant
23 because plaintiffs have argued that Mr. Schoep's current world
24 view is merely a disguise, is a ruse that he is attempting to
25 play on the Court, whereas Mr. Davis will -- as a character

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1 witness, will explain how Mr. Schoep has actually gone through
2 a tremendous personal transformation since this matter
3 occurred, which I think is relevant.

4 THE COURT: Why? Why is it relevant? I don't see
5 the relevance of a change of heart after an incident.

6 MR. ReBROOK: I think --

7 THE COURT: It's not a defense.

8 MR. ReBROOK: I'm sorry?

9 THE COURT: It's not -- what is it a defense to?

10 MR. ReBROOK: It's character testimony, Your Honor,
11 is what it is. It's not -- it's not, per se, a defense to the
12 claim of a conspiracy to commit violence in Charlottesville.

13 THE COURT: But I just don't -- I don't see why it's
14 relevant to this case.

15 MR. SMITH: Edward --

16 MR. SPENCER: Can I jump in here?

17 MR. ReBROOK: Yes, please.

18 MR. SPENCER: This is Mr. Spencer. I strongly take
19 the side of the plaintiffs in this matter in terms of excluding
20 his testimony. I have seen --

21 THE COURT: Wait. Wait. There are two people -- I
22 cut the plaintiff off. I just wanted to ask defense counsel
23 the relevance of it. And I didn't see it. I don't --

24 MR. SPENCER: There is no relevance. That's why he
25 can't answer you.

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1 THE COURT: Okay. But let plaintiff finish her
2 argument.

3 MR. ReBROOK: Well, it will show my client's
4 propensity or lack thereof for violence.

5 THE COURT: Well, not likely. But let plaintiff
6 continue to argue the motion. Then I'll allow you to come back
7 and respond. I thought I could cut this off.

8 Plaintiffs' counsel, would you?

9 MS. HIROMI: Thank you, Your Honor.

10 Plaintiffs would note that we do not intend to
11 discuss Mr. Schoep's change of heart after Unite the Right at
12 trial. Our focus is on Mr. Schoep's state of mind and
13 character at the time of the planning of Unite the Right.

14 THE COURT: Okay. I think I understand your point
15 and your position.

16 MS. HIROMI: Thank you, Your Honor.

17 THE COURT: Would defendant like to say anything
18 else?

19 MR. ReBROOK: I would, Your Honor. If I'm to
20 understand the current lay of the land, plaintiffs argue that
21 they have an expert who is going to come in and testify to the
22 true meaning of the words and ideas expressed by the
23 defendants, and that is somehow relevant, as if it's not, you
24 know, voodoo. But if I have a witness come in that supports --
25 that tries to humanize my client and show him as something a

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1 little more nuanced than a Nazi, then that is not relevant? It
2 seems a little biased to me. By "a little," I mean it seems
3 extremely biased to me.

4 (Stenographer clarification.)

5 THE COURT: Repeat the last part of your statement.

6 MR. ReBROOK: The relevant evidence is inherently
7 prejudicial, but it is only unfair prejudice if it stands to
8 outweighing probative value, which permits exclusion of
9 relevant matter under Rule 403. Why is it plaintiffs are
10 allowed to bring in a witch doctor to talk about the true
11 meaning of things that defendants may or may not have typed in
12 Discord or on Facebook, and that's somehow admissible
13 evidence -- I guess he's an expert in reading peoples' minds,
14 whereas here I was thinking that was God's gift alone -- and
15 then my expert, or my learned witness, who plans on testifying
16 to show that Mr. Schoep is a human being and not a swastika,
17 that's somehow not relevant? It's only not relevant because it
18 doesn't work to the advantage of the plaintiffs.

19 THE COURT: Well --

20 MS. HIROMI: Your Honor, if I may?

21 THE COURT: Yes.

22 MS. HIROMI: In Mr. ReBrook's opposition to our
23 motion he specifically stated that he would not be calling
24 Mr. Davis as an expert. An expert --

25 MR. ReBROOK: I'm not.

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1 THE COURT: Okay.

2 MS. HIROMI: But he's just noted that he would like
3 to produce him as a witness to testify in opposition to our
4 expert and that his testimony would be based on his long
5 experience and expertise.

6 THE COURT: Okay. Mr. ReBrook, the difference is
7 that the experts that the Court has allowed to testify were
8 properly allowed to -- being allowed under the rules of
9 evidence. The rules of evidence your client -- your witness is
10 not an expert and is testifying about an irrelevant matter.
11 The fact that someone has changed their character after the
12 event in question is not relevant. And so I'm granting the
13 motion that Mr. Davis may not testify.

14 Anything else on -- they are all the plaintiffs'
15 motions, I believe, right, that you were asking for today?

16 All right. Do the defendants have any motions they
17 wish to bring up?

18 MR. SMITH: Yes, Your Honor. So there was -- I guess
19 the first -- okay. So here's one that I wanted to go on record
20 about, Your Honor.

21 Mr. Cantwell -- this is the easy one to start things
22 off, I guess. Mr. Cantwell put in a motion in limine to
23 preclude references or any kind of mention of what -- I think
24 the motion was styled, what is in popular culture referred to
25 as "the Holocaust." I think he said "the supposed Holocaust"

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1 or something.

2 You know, I'm not going to join his motion or, you
3 know, file one of my own in this regard. And it's because
4 there is this -- this is this rather ugly, you know, sort of --
5 there's this stereotype, Jewish stereotype, that, basically,
6 it's like they can't go an hour without talking about the
7 Holocaust. I don't want to perpetuate a stereotype like that.

8 So I'm going to give plaintiffs' counsel the benefit
9 of the doubt that they won't mention that word or reference it
10 in any way because it's so utterly irrelevant to the
11 proceedings and infinitely prejudicial and that they would just
12 sort of know better. So I'm not going to file my own motion in
13 that regard or join Mr. Cantwell's, but I do -- I would want to
14 make clear that if they even mention a syllable of it, I'm
15 going to object vehemently.

16 MR. ReBROOK: This is Edward ReBrook. I must agree.

17 MS. KAPLAN: Your Honor, I think you may have already
18 denied this motion.

19 This is Roberta Kaplan for plaintiffs.

20 References to the Holocaust in this case are going to
21 come in primarily through the words of the defendants
22 themselves who repeatedly, multiple times, in their messages,
23 in their messages, in videos, talked about burning the kikes,
24 putting the kikes in the oven, and gassing the kikes, all of
25 which, Your Honor, you obviously know, are references to the

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1 Holocaust. So there's no way to exclude that from the case.

2 And it's already part of Deborah Lipstadt's report,
3 which Your Honor -- which they actually withdrew their
4 objection to and will be part of the expert testimony in this
5 case, to explain to the jury what those phrases mean.

6 THE COURT: All right. I --

7 MR. SMITH: Your Honor --

8 THE COURT: Yes.

9 MR. SMITH: Sorry, Your Honor. You were already
10 starting to say something.

11 MR. CANTWELL: If I may, I have not withdrawn my
12 objection to any of this. And that's all I wanted to add to
13 that point.

14 THE COURT: Okay.

15 MR. SMITH: You know, if you want to introduce
16 statements that the defendants made that have that word in it,
17 okay, but --

18 THE COURT: Well, no, you can't exclude -- these are
19 things that might come up in trial, and objections can be made
20 at trial, but I think I've ruled on these matters.

21 MR. SMITH: I'm not sure, Your Honor. There were so
22 many -- Mr. Cantwell filed a lot of motions, and some of them
23 the Court got to and I think some of them it hadn't yet.

24 I didn't see that the Court had gotten to this one in
25 particular, so it might actually be. I just wanted to sort of

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1 put that out there on the record that I would find that, you
2 know, the use of that, other than when we're talking about
3 statements by the defendants themselves, I would find it
4 objectionable, and I plan to object at trial.

5 THE COURT: Well, certainly if they're statements by
6 the defendants, they would not be excluded.

7 MR. SMITH: I'm concerned. I would like the
8 proceedings not to be turned into some sort of, you know --

9 THE COURT: All right. I understand. The motion was
10 denied. And this was no blanket ruling that it --

11 MR. SMITH: Thank you, Your Honor.

12 THE COURT: -- could not be mentioned.

13 MR. SMITH: I appreciate it. Thank you.

14 THE COURT: Okay.

15 MR. SMITH: That was one thing. The other -- I also
16 wanted to ask the Court, will there be -- will there be a
17 conference room for defense counsel and *pro se* defendants,
18 perhaps, to caucus in the mornings before proceedings start, so
19 that, for example, we don't have to speak about sort of joint
20 defense matters, if you will, right in front of plaintiffs'
21 counsel? Is that something that the Court is able to make
22 available?

23 THE COURT: There will be -- you'll have a place on
24 the third floor to conference. And when you take breaks --

25 MR. SMITH: That's great.

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1 THE COURT: -- there will be a place for the
2 defendants to go, separate from -- as will the plaintiffs have
3 a place to go.

4 MR. SMITH: Of course. That's perfect. Thank you,
5 Your Honor.

6 The other -- the only other motion that I have --
7 this one is actually a motion. The Court -- I asked the Court
8 if it would be willing to reconsider its ruling on the Heaphy
9 report in light of the Rule 807 residual exception, which was
10 not argued by any other defense counsel, apparently.

11 The plaintiffs did brief it, but it just wasn't
12 argued by anyone else. And this is an extremely important
13 piece of evidence, Your Honor. It's really a key piece of
14 evidence. Really, it's an extraordinary document, made under
15 extraordinary circumstances, and it possesses extraordinary
16 indicia of reliability.

17 And the Court should absolutely consider the Rule 807
18 residual exception because, as far as the potential exceptions
19 this could be admitted under, I think 807 is the most fitting
20 here. I didn't think that the public records exception was
21 quite on point, but 807, it definitely fits, and for a lot of
22 reasons that I'd like to explain to the Court.

23 THE COURT: Well, I mean, I ruled that the report is
24 not admissible. And I'm prepared -- I'll allow you to say
25 something, but I'm prepared to rule -- to actually file a short

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1 order regarding --

2 MR. SMITH: I understand, Your Honor. I understand,
3 Your Honor, but there are statements by one of the plaintiffs
4 in this report which are admissions by a party opponent. For
5 example, those might be worthy of the Court's consideration for
6 admission. They're very damaging statements to that plaintiff.

7 Also, there are -- we're not looking to get the
8 conclusions of the report admitted into evidence, but rather
9 just the factual matters in the report. And I'm not
10 necessarily interested in seeking admission of any hearsay
11 beyond -- you know, any hearsay beyond what somebody told
12 Heaphy. So in other words, if somebody is saying -- you know,
13 if somebody else is -- or, I'm sorry, if Heaphy -- if we're
14 talking about what -- what somebody else told Heaphy that
15 somebody said, so if it's just somebody telling Heaphy
16 something, I'm -- you know, the reason why I think that the
17 Court should admit that kind of thing here is because Timothy
18 Heaphy -- I mean, the circumstances surrounding this report,
19 contrary to what the plaintiffs would have you believe, are --
20 it's just -- it's an extraordinarily credible document.

21 The City of Charlottesville paid Mr. Heaphy's firm a
22 good amount of money, \$250,000 or something, in order to do a
23 truly independent report. And they said, "You have" -- "You
24 will have unfettered discretion here. You'll have unfettered
25 access to everything. You will have full, 100 percent

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1 cooperation." And in the report it's verified that, yes,
2 that's exactly what happened. They had 100 percent
3 cooperation. They had unfettered access. And there's this
4 212-page report that came out. And of course the report itself
5 is a model of -- for any independent investigation. It's an
6 excellent report. It's just extremely well-done.

7 And, you know, Your Honor, Mr. Heaphy was formerly a
8 United States attorney for this district --

9 THE COURT: I know. I know all about him. He was --
10 but --

11 MR. SMITH: Yeah --

12 THE COURT: But that doesn't alter the -- no matter
13 how distinguished he might be, that doesn't alter the
14 admissibility of the report as evidence.

15 MR. SMITH: Well, but plaintiffs are not -- I
16 understand, but plaintiffs are not trying to -- really, the
17 question about the residual exception turns on credibility,
18 Your Honor. It turns on trustworthiness and the extraordinary
19 nature of the trustworthiness of the evidence that's sought to
20 be admitted.

21 And here we have somebody who is a United States
22 attorney and is currently the chief investigative counsel for
23 the January 6th Commission on -- I don't know exactly what the
24 full name of it is. But, you know, this is after he released a
25 report that the media really didn't like that much because it

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1 didn't blame -- it didn't sort of blame the Nazis enough. And
2 so -- you know, it didn't --

3 THE COURT: But that's not why it's not admissible.
4 I mean, I really -- we considered this. And I would agree
5 with -- I could agree that it would be maybe good for the
6 report to be admissible, but it's not. I mean, and there's
7 nothing I can change.

8 MR. SMITH: But, Your Honor, there is something
9 you --

10 THE COURT: That's the decision I've reached, and
11 I -- sir?

12 MR. SMITH: There is something you can do, Your
13 Honor. The residual exception wasn't considered by the Court.

14 THE COURT: Well, I have considered it since you
15 brought it up, and I'm prepared to file a supplemental order
16 which I think will cover it.

17 MR. SMITH: Perhaps I could make an argument first,
18 before --

19 THE COURT: Well, I thought you were making the
20 argument, but...

21 MR. SMITH: Well, I was. You know, I still had more
22 to say about it.

23 So -- and this is -- so, of course, Mr. Heaphy was
24 hired for this position, which was Democratically appointed,
25 after he put out a report that, you know, was not -- was

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1 critical of lots of people, but not the rally held. And they
2 still wanted to hire him to be the chief investigative counsel
3 for this January 6 Commission, a Democratically-appointed
4 commission.

5 I think that tells you that what people think, what
6 people seem to believe about him, is that when it comes to this
7 sort of political -- these sort of political violence-type
8 events, right, that he's the guy that gets --

9 THE COURT: Well, that doesn't change the rules of
10 evidence. I mean, the rules tend to be objective. There's no
11 Heaphy exception.

12 MR. SMITH: But there is a residual exception. And
13 this is the only independent report of these events in
14 existence ever. Ever. And the thing is --

15 THE COURT: You can call the witnesses. People that
16 talked to Mr. Heaphy, you can call.

17 MR. SMITH: No, Your Honor. A lot of these people
18 only talked to Mr. Heaphy because they were allowed to by
19 their --

20 THE COURT: Well, you don't know. You could depose
21 them and --

22 MR. SMITH: Well, there's not really any time to do
23 that, Your Honor. Mr. Heaphy's firm took a lot of time to do
24 that report.

25 See, the thing about the Heaphy report, Your Honor,

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1 is it's the great leveler. The reason plaintiffs want to keep
2 it out so bad is because it represents the investigation that
3 the defendants might have been able to do if they had
4 \$20 million to spend on the case. Now, Mr. Heaphy did it for
5 about \$250,000. I'd say that's quite a deal.

6 But it really is what makes -- it's the document that
7 will make this case fair. To pretend that it doesn't exist is
8 to do a huge disservice to the jury. This is an exceptional
9 report in exceptional circumstances, and the credibility has
10 never been questioned except by the plaintiffs now.

11 Even when the media sort of buried it because they
12 didn't really like what it said, nobody ever said that Heaphy
13 report isn't true. Nobody.

14 THE COURT: Well, okay, but do you have any case
15 law -- any case law that would back you up on this particular
16 point?

17 MR. SMITH: Your Honor, I'll do a search for
18 something that comes close to this. But the thing is, this is
19 ultimately -- it meets the standards that the Courts have set
20 out for when the residual exception is appropriate. It's
21 really just -- this is truly left to the Court's discretion in
22 a lot of ways.

23 The thing is, Your Honor, that -- the thing about
24 is -- sorry, my voice was going a little bit.

25 The thing about it, Your Honor, is that, you know,

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1 we're not seeking to get the whole report admitted. We're not
2 seeking to admit -- get the conclusions of the report admitted,
3 just the facts which Mr. Heaphy was able to get at, which the
4 defendants would never have been able to get at, including
5 through compulsory process.

6 The only reason Mr. Heaphy was able to get these
7 kinds of statements is because the City of Charlottesville
8 promised 100 percent full cooperation and unfettered access,
9 which defendants would never have had. That's why it's
10 evidence that couldn't really reasonably be obtained through
11 other means. And it's the best evidence that the defendants
12 could have obtained of a lot of things.

13 You know, the sheer number of people who would have
14 to be interviewed to get a lot of these facts, or to be
15 deposed, is just off the charts. We'd have to have, well,
16 plaintiffs' team of lawyers in order to do something like that.

17 THE COURT: Well, I don't want to cut you off, but I
18 don't want to --

19 MR. SMITH: Your Honor, it's so probative. It's such
20 a probative piece of evidence. There has to be -- I mean, if
21 the residual exception doesn't apply here, then where would it
22 apply? The fact that there probably aren't any cases about any
23 residual exceptions --

24 THE COURT: I don't want to cut you off, but I don't
25 want to be patronizing. I have ruled that it's inadmissible.

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1 And if you have law that could change my mind, that would be
2 okay. But just the idea that this is the greatest one that was
3 ever done is not --

4 MR. SMITH: I'm not saying that, Your Honor.

5 THE COURT: It's not really admissible unless it's
6 otherwise admissible under the rule.

7 MR. SMITH: I understand, Your Honor.

8 THE COURT: And in the opinion, it's my recollection
9 we set forth that there were discrete facts that you wish to
10 take out of the report, but you had to file those with the
11 Court and justify why they were admissible. Not --

12 MR. SMITH: I think the Court --

13 THE COURT: -- just the fact that they were not in
14 the report is not -- they're not admissible.

15 MR. SMITH: I think the Court was referring to the
16 state of mind aspect.

17 THE COURT: No. I was referring to a previous
18 decision.

19 I will file, as I said, a supplemental order
20 regarding the report. But you'll just have to take exception
21 to the ruling or object to the ruling.

22 MR. SMITH: Of course, Your Honor.

23 THE COURT: But that's the ruling.

24 MR. SMITH: Your Honor, if there are admissions by a
25 party opponent in there, is that going to be sufficient for the

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1 Court to admit them if they're -- for example, Plaintiff Seth
2 Wispelwey is quoted in the Heaphy report several times.

3 THE COURT: Mr. Smith, I'm not going to rule about,
4 if so-and-so said so-and-so, will we -- I mean, you're not even
5 suggesting to me what it is.

6 MR. SMITH: I can point to -- I'm happy to point the
7 Court specifically to it if it would like. I'm just going to
8 pull it up and do a quick search for Wispelwey. It comes up
9 several times.

10 THE COURT: All right. Moving on --

11 MR. TOLENTINO: Your Honor, can I put one thing on
12 the record to make something clear? We don't think Mr. Smith
13 should be able to submit anything else on this issue. And with
14 respect, he had an opportunity to file a motion for
15 reconsideration. The reconsideration standard is exceptionally
16 high. He also, by dint of your order, had an opportunity to
17 identify specific aspects of the Heaphy report that he thought
18 were admissible. He missed that deadline.

19 So I think it's unfair to let this go on any longer,
20 Your Honor. I think you should issue your opinion, which is
21 absolutely correct.

22 THE COURT: Well, I was going on till you interrupted
23 me.

24 MR. TOLENTINO: Sorry, Your Honor. I just wanted to
25 be clear because Mr. Smith --

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1 MR. SMITH: Is plaintiffs' counsel serious? I've
2 been on this case for six weeks, Your Honor. I've had to catch
3 up with four years of litigation. I don't like plaintiffs'
4 counsel's attitude or --

5 THE COURT: Okay. Thank you.

6 MR. TOLENTINO: Yes, Your Honor. I'll sit down.

7 THE COURT: We're moving on. We could go to lunch
8 now. I do have some other issues. Do you all have any other
9 issues you want to bring up?

10 MS. DUNN: We have a couple very brief issues.

11 THE COURT: All right. I don't know -- this, what
12 I've got, is going to take probably about 15, 20 minutes.

13 MS. DUNN: I think what we have would take that or
14 less.

15 THE COURT: Do you all prefer to go on and then
16 adjourn and not come back after lunch? Everybody can do that?

17 MR. SMITH: Yes, Your Honor. We'd prefer it.

18 MR. SPENCER: I'd prefer to push through.

19 Your Honor, I have one small issue I would like to
20 raise. And I will keep that to be very brief.

21 THE COURT: Yes, sir.

22 MR. SPENCER: Would you like me to go on this now?

23 THE COURT: Okay. Well --

24 MR. SPENCER: I can.

25 THE COURT: Go ahead if you can.

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1 MR. SPENCER: This is an issue that regards the
2 exhibit list. And I can file a limine motion. I've been
3 avoiding doing that because the plaintiffs, when I've spoken to
4 them privately, they've given me -- I appreciate the fact that
5 they don't plan on raising these issues, but they have not
6 really given me a hard guarantee. And so I would prefer not to
7 waste the Court's time by issuing additional motions. But if
8 they could simply give me a guarantee or we could handle this
9 matter now.

10 The issue involves an exhibit list which, you know,
11 huge exhibit list by the plaintiffs, and it includes some
12 messages between myself and my then wife that were published in
13 I believe the *Huffington Post*. These were published at a time
14 in which we were going through a divorce. The messages are
15 very unpleasant.

16 Hold on one moment.

17 THE COURT: Do you all agree not to --

18 MR. BLOCH: Yes, Judge.

19 THE COURT: Plaintiffs agree not to bring that up.

20 MR. SPENCER: Excellent. I have nothing more to say
21 then. Thank you.

22 MR. SMITH: Your Honor, about the exhibit list, the
23 other day, on Monday, I had asked about receiving a copy of the
24 exhibits on plaintiffs' -- let's see -- 3,791-exhibit exhibit
25 list. And I was told by Michael Bloch at the time and he said

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1 we could go offline and take care of that. It's been four days
2 and I haven't received anything yet except for one exhibit and
3 a video, which I'm not even sure what that one is. So I've
4 received one of 3,791.

5 I feel like it's three days before trial now. I'd
6 like to see the exhibits the plaintiffs plan to present.

7 THE COURT: Let -- Mr. Bloch is going to respond.

8 MR. BLOCH: Judge, this is Michael Bloch. We did
9 agree as a matter of courtesy that we would give Mr. Smith our
10 actual exhibits. The last correspondence I recall on this is I
11 emailed Mr. Smith asking him the format in which he would like
12 the exhibits. I don't believe we've heard back. We are ready
13 to send those immediately. Happy to discuss this further with
14 Mr. Smith offline.

15 MR. SMITH: Thank you, Michael.

16 THE COURT: Does that take care of that?

17 MR. SMITH: Yes, Your Honor. Thank you.

18 THE COURT: All right. You may.

19 MS. DUNN: Your Honor, we had earlier this week at
20 one of the court conferences, the Court had suggested he would
21 give the parties the draft preliminary instructions or the
22 Court's preliminary instructions. Do you plan to do that today
23 or how would you like to handle it, Your Honor?

24 THE COURT: From me to you, you're talking about?
25 The preliminary instructions to the jury after we've selected

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1 the jury?

2 MS. DUNN: Correct.

3 THE COURT: Okay. I'll get those to you before --
4 before Wednesday.

5 MS. DUNN: Thank you, Your Honor. There are
6 instructions that, if Your Honor is open to this, Mr. Sanchez
7 is prepared to address the Court, that we are hoping will be
8 given to the jury. We can also address this at a later date
9 because obviously you won't be instructing the jury on Monday.

10 THE COURT: This is the worst acoustics in the
11 country. I bought hearing aids just for this court.

12 MS. DUNN: Your Honor, I join you in difficulty
13 hearing. So I'm very sympathetic. I'll try to be louder.

14 We would like to present argument or some advocacy to
15 the Court about certain instructions that we are hoping will be
16 given preliminarily to the jury because of the complexity of
17 this case.

18 And so my question at this point is: Would Your
19 Honor like to hear that today or should we put that over to a
20 different time?

21 THE COURT: Well, can you just send me a general
22 list? You sent me a packet of instructions. Are the
23 instructions included in that packet?

24 MS. DUNN: Yes, Your Honor. And if it would help the
25 Court, we can send a list of instructions that we think are

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1 particularly important.

2 THE COURT: The ones you particularly want. I'm not
3 inclined to read 60 or so pages to the jury preliminarily.

4 MS. DUNN: Understood, Your Honor. We will submit
5 that to the Court. Additionally, we had a procedural question,
6 which is: Does Your Honor plan, once jury selection is
7 concluded, to roll right into opening statements, or if, for
8 example, we conclude jury selection at, you know, late in the
9 day, will Your Honor start the next morning?

10 THE COURT: Well, once we -- we don't anticipate all
11 the jurors will be in the courthouse when we complete it. So
12 it will of necessity take some time to get the jury here,
13 probably. I hate to confine myself to something like we come
14 in at 9 o'clock or 9:30 and get the last juror, I'd like to
15 maybe start in the afternoon, but I would say most likely we
16 would end up starting in the morning.

17 MS. DUNN: Thank you, Your Honor. That's very
18 helpful. Let me just consult with my colleagues to make sure
19 there's nothing else that we need to bring up at this time.

20 Your Honor, Mr. Bloch would like to close the loop
21 with the Court on the delivery to Mr. Cantwell of the
22 documents. If he could do that, we'd appreciate it.

23 THE COURT: All right.

24 MR. BLOCH: Thank you, Judge. Judge, you have issued
25 two orders to plaintiffs to provide certain documents to

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1 Mr. Cantwell. One concerned the actual exhibits that are on
2 our exhibit list. We have delivered that today to Mr. Cantwell
3 in a thumb drive.

4 Secondly, yesterday you told us to meet and confer
5 with Mr. Cantwell regarding which documents he would like from
6 the docket sheet to be provided. Mr. Cantwell and I spoke a
7 number of times yesterday. By the time -- the last time we
8 spoke, he had still not received the docket sheet. What we
9 have done today is we have given Mr. Cantwell a box that
10 includes the transcripts of all the depositions that we have
11 designated for testimony at trial. It includes a docket sheet
12 so that Mr. Cantwell can go through and choose if there are
13 additional documents that he would like. We've provided the
14 responses to the motions that Mr. Cantwell filed. And we're
15 ready to, when appropriate, to meet with Mr. Cantwell and
16 discuss if there's anything else from the docket sheet that he
17 would like to be provided.

18 One last thing: We had discussed and I believe
19 agreed to a set of stipulations that we have with us today.
20 And at some point I would like to ask if Mr. Cantwell would
21 sign the stipulation. But those are the three issues.

22 MR. CANTWELL: So I was actually going to ask about
23 this. I received this document yesterday, the joint
24 evidentiary stipulations, and I am certainly not prepared to
25 agree to them. Mr. Bloch and I spoke about something called

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1 Impact Software that the plaintiffs had hired somebody to
2 develop so that the Discord data could be human readable in a
3 courtroom.

4 The use of that software I've said I'm happy to
5 stipulate to, having seen it at the deposition of Mr. Daly. I
6 have not seen the Discord data yet. I have not seen the
7 Facebook data. I have not seen these documents which are
8 produced pursuant to a government agency. And a lot of this
9 stuff here I haven't seen is the moral of the story. And I'm
10 not in a position to stipulate to the authenticity, much less
11 the admissibility, of something I have not yet seen.

12 I'm not going to trouble the Court with too much
13 today because it's all on the record. I've had tremendous
14 trouble preparing. I've been obstructed by the United States
15 government. I would like to add to the record today I've
16 written a sworn declaration about the state of those
17 preparation attempts, running up till this morning.

18 And Mr. Bloch, to his credit, him and I have been
19 able to speak amicably about these things. He definitely tried
20 to get me the docket yesterday. The fax machine received his
21 fax but the jail staff wouldn't deliver it to me. I'm getting
22 the docket today, which is helpful to do. I've also received
23 the plaintiffs' third amended trial exhibit list today. This
24 is the first exhibits list I've received from anybody in this
25 case.

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1 And so I sort of still have a lot to catch up on with
2 trial approaching Monday. And so I'm not in a position to
3 stipulate to the stipulations that were handed to me last
4 night.

5 THE COURT: All right. Do you have any estimate of
6 when you might be able to --

7 MR. CANTWELL: Judge, I'd move to extend everything
8 by 12 months. I think we know I'm not going to get a positive
9 answer to that today, but my trial preparations were delayed by
10 14 months by being kept in the dark by plaintiffs' counsel.
11 And then immediately after they provided me with a 2 terabyte
12 encrypted hard drive in jail. Less than three weeks later, it
13 was taken from me by the U.S. marshals. I got that drive back
14 September 15th, and on October 4th I was separated from that
15 drive again.

16 So I have no idea what's going on here. I don't know
17 what this pile of documents next to me is. I know I saw -- one
18 of the things the plaintiffs gave to me yesterday were their
19 deposition designations. And so there's some number of
20 depositions there that they want from this moment to this
21 moment in. I don't have the context that they're cutting out.
22 I believe that what they have -- if I understand correctly what
23 Mr. Bloch told me yesterday he would provide me today was the
24 portions that he wants to admit, but not the portions that he
25 does not want to admit. So I have no idea -- I'm sorry, I'm

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1 wrong?

2 MR. BLOCH: That's not correct. We've given you full
3 transcripts of --

4 MR. CANTWELL: These are the full depositions?

5 MR. BLOCH: Correct.

6 MR. CANTWELL: I stand corrected. But at that, the
7 idea that I would be able to read all of these things and
8 understand them prior to Monday seems pretty -- a pretty
9 extreme challenge to me.

10 I don't even -- at the Central Virginia Regional Jail
11 the plaintiffs yesterday sent me a USB drive of some sort. The
12 jail staff put that in my property, a separate container for
13 valuables, is my understanding. It's my only valuable there.
14 And I have written to the captain requesting computer access so
15 that I can review digital evidence in this case. I have not
16 heard back from the captain yet. I don't know when I will or
17 what his answer will be.

18 The hard drive that the plaintiffs gave me on April
19 6th, 2021 that was supposed to catch me up on the 14 months I
20 had been previously left in the dark, that to the best of my
21 knowledge is at the United States Penitentiary in Marion,
22 Illinois. When I was told to pack up, they told me to hurry
23 up. They told me I had to rush. And I asked about getting my
24 legal documents and the hard drive sent to me down here. They
25 said that I had to leave -- write a request to intelligence

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1 research specialist Kathy Hill. I did submit that request
2 electronically as of this morning. Nobody has delivered those
3 documents to me. Nobody has delivered the hard drive to me.
4 I'm completely in the dark.

5 THE COURT: Okay. Have the other defendants
6 stipulated to these documents? You might talk to the lawyers.
7 I mean, the authenticity of the documents, I'm sure the lawyers
8 for the other defendants could fill you in on without you --

9 MR. CANTWELL: I mean, I understand the reasoning
10 behind what you're saying. The situation that I'm met with
11 here is that I don't know the other attorneys in this matter,
12 save for Mr. Kolenich, who I departed ways with in 2019, right?
13 And so I'm not -- I have no reason to put any faith in the
14 contents of the Discord material, for example, which was leaked
15 onto the Internet, which I believe -- my personal belief is --
16 I can't prove it in this courtroom -- is that it had to have
17 been a Discord employee who did that.

18 So for all I know, the Discord material could produce
19 a chat between me and Richard Spencer that says things that we
20 didn't say. And since I have no -- I have no way of looking at
21 this, right --

22 THE COURT: If hypothetically Mr. Spencer should have
23 agreed to it, would you have any reason --

24 MR. CANTWELL: Mr. Spencer is not my friend. I don't
25 know these people. That's part of my defense. And so what I'm

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1 met with here is a bunch of people I don't know stipulating to
2 the authenticity of things I haven't seen.

3 THE COURT: Okay. Well, you've answered my question.
4 Anything else?

5 MS. DUNN: No, Your Honor. Thank you.

6 THE COURT: I mean, you all will continue to confer
7 and reach any agreement you can.

8 Anything else?

9 MR. SPENCER: I would simply -- this might help
10 Mr. Cantwell in his current state. I did not participate at
11 all in that Discord, and that is represented in the Discord
12 that was leaked to Unicorn Riot, and which has also been given
13 to the plaintiffs by Discord itself. So at least in that one
14 case, in terms of my total nonparticipation in the
15 Charlottesville Discord, it actually does seem to me to be
16 accurate.

17 So I would offer that. Maybe that will help clear
18 your mind a little bit just in a limited way, perhaps.

19 MR. CANTWELL: I'm certainly glad to know that no
20 false representation of conversations between me and Defendant
21 Spencer will be produced. It seems to me that I have
22 procedural rights that are being trampled on, is my concern
23 here. That I'm being asked -- over and over again I say I
24 haven't been able to see this material, and people keep saying
25 are you ready to stipulate to it yet? And this is making --

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1 it's making my antennas itch.

2 MR. SMITH: Your Honor, as much as I really want this
3 trial to happen on Monday, Cantwell, he's making some
4 reasonable points. I can't imagine that this trial could
5 possibly be rescheduled at all. I just can't -- it just can't
6 happen. But he's making some totally valid points.

7 MR. SPENCER: I agree with that.

8 MR. CANTWELL: It's completely beyond my control. My
9 understanding --

10 THE COURT: Okay. I understand that.

11 Anything else, Mr. Bloch?

12 MS. DUNN: No, Your Honor.

13 THE COURT: Go back on the jurors. There were a
14 number of jurors who requested before, when they got the
15 questionnaire, they requested that they be excused. One of
16 those -- and I excused them. And I told you the other day
17 about the groups of people I had excused, doctors and people
18 with -- that I thought had valid reasons.

19 One was Juror Number 310, whose questionnaire was
20 discussed here today. And I think, because there was an
21 objection, I left it in. But that was before I realized it was
22 a juror that I had already excused. I stand by the ruling that
23 I have excused him, and so that juror will not appear.

24 MS. DUNN: 310, Your Honor?

25 THE COURT: 310.

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1 MR. SMITH: That's fine, Your Honor. We have no
2 objection to that.

3 THE COURT: I don't recall anything about his
4 partiality toward one side or the other. It may appear, but
5 that was not the reason for the excuse -- he was excused.

6 Okay. Just let me say a few things and I will move
7 on. During the voir dire days, Monday and Tuesday, we
8 anticipate four panels each day. Potentially we expect 25 on
9 each panel of prospective jurors. The Court will conduct
10 questioning of prospective jurors.

11 Afterwards, the parties may submit suggested
12 follow-up questions to the Court. It would make sense that
13 they send them on paper rather than -- we've got to avoid
14 sidebars as much as possible. But try to limit that. But I
15 will entertain those -- any follow-up questions.

16 We will then discuss potential for-cause strikes
17 outside of the presence of the jury, then call the jury back
18 when we take peremptory strikes. Prospective jurors will have
19 random numbers. Each side gets six peremptory strikes, six for
20 the defendants to be collectively used, not individually.

21 When we start trying the case -- I mean, court will
22 start at 9:30 Monday because the jurors come in at 8:30, report
23 in. But we'll start at 9:30 Monday and Tuesday. Now, when we
24 start the trial, we'll start at 9 o'clock.

25 Now, regarding the witnesses, can -- first of all,

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1 can the plaintiffs -- the marshals would like to know who your
2 witnesses are so they can be identified when they come in. Can
3 you give them a list?

4 MS. DUNN: Of course, Your Honor.

5 THE COURT: All right. If anybody is appearing by
6 Zoom, any party or lawyer, and you have need to object, you
7 will have to flag the clerk, Ms. Moody, who will alert the
8 Court to the potential objection.

9 Also, Veterans Day comes up on November the 12th, I
10 think it's Thursday, November the 12th. And we would take that
11 holiday.

12 Heidi, would you like to explain how you will conduct
13 the peremptory challenges?

14 First we will decide on the strikes for cause. And
15 then we'll go into the peremptory challenges at that time.
16 I'll let Ms. Wheeler tell you.

17 THE CLERK: You will get what traditionally would
18 have been counsel's list, which would have been the alpha list,
19 which in this case will be a numeric list, which will just have
20 their numbers on it, the pool sequence numbers, which is how
21 we'll have them seated in the courtroom. So you'll have that
22 number when we come in while you're getting a chance to hear
23 the judge do voir dire, and you'll see where they are as they
24 respond, and we can take notes as we normally would.

25 Then when we go to your time to do your peremptory

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1 challenges, we'll also have what we will have marked as the
2 random list. And that will have on the left-hand column
3 numbers 1 through however many are in the courtroom. And
4 beside that will be their full sequence number, their name, as
5 you will -- that's what we refer to it as we've been doing it.
6 Their name is that number. And I will look at you and we'll
7 start with plaintiff and go to the defendant. And what we will
8 do is I will simply say, plaintiffs, Juror Number 1, pass or
9 challenge? And you say -- take as long as you want and decide.
10 Tell me.

11 If you say pass, I'll go to defense, Juror Number 1,
12 pass or challenge? If you both pass, that is a juror that will
13 be seated. If you challenge, I go to the next juror. Then we
14 go down the list until everybody has used their challenges or
15 peremptory challenges, or we have our 12 jurors, whichever
16 comes first. You don't have to use them all; but when we get
17 our 12, we have our 12.

18 MS. DUNN: Your Honor, may I ask Ms. Wheeler a
19 question?

20 THE COURT: Yes.

21 MS. DUNN: Thank you. That was very helpful. I just
22 want to make sure we understand there is one column that's 1,
23 2, 3, 4, 5.

24 THE CLERK: And beside that is the sequence number.
25 So you look at that sequence number to match who you're

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1 visually seeing.

2 MS. DUNN: Right. And then -- but the way that we
3 know whose questionnaire it is, is next to that number is the
4 number of the questionnaire, which is their name for these
5 purposes?

6 THE CLERK: Yeah, that sequence number that you're
7 looking at -- like today we talked about 268. They're going to
8 have a number. We're going to assign them a number when they
9 check in. They'll have a tag on, 268.

10 MS. DUNN: Thank you very much.

11 THE COURT: So the jurors will be given -- those
12 jurors who are to serve who are not stricken, they will be
13 given instructions, tentative instructions when to return.

14 THE CLERK: As we move from one pool to the next.

15 THE COURT: And they will be excused to come back.

16 MS. DUNN: Understood.

17 THE CLERK: If I wasn't clear, once I go plaintiff
18 and defendant, then the next round I'll go defendant, Juror
19 Number 2, pass or challenge? So we switch back and forth.

20 MS. DUNN: Thank you.

21 THE COURT: Is there anything else that anyone would
22 like to bring up?

23 MR. SMITH: Your Honor, that procedure, that's not --
24 is that -- does that happen to be written down anywhere? Is
25 there like -- does the Court have like a guide for that, that

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1 it uses?

2 THE COURT: I have not used the procedure except
3 since COVID because we've had to go to -- we can't bring in the
4 whole venire at one time. We've had to go --

5 MR. SMITH: No. I didn't mean like -- I meant in
6 terms of like -- so I was listening to what was being said. I
7 can't say that I was completely following it. I was just
8 wondering if there was a resource that I could go to that has
9 that stuff written down on it that I could, you know, at least
10 take a second --

11 THE COURT: I think we have written instructions
12 somewhere, don't we, Heidi?

13 THE CLERK: I can get some to -- I think we have
14 something written down.

15 MR. SMITH: Yeah, I'm sure like Monday morning if I
16 saw it, I'd probably get it pretty quickly.

17 THE COURT: I think after we do all the strikes for
18 cause, we'll have to get all -- let all the defendants confer
19 and agree on who they want to use their peremptory strikes on.
20 And, of course, plaintiff, too. We'll take some time between
21 strikes for cause and the peremptory challenges.

22 All right.

23 MR. CANTWELL: If I may, two brief things. These
24 juror questionnaires, I'm only allowed to see these at this
25 building, right?

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1 THE CLERK: That is correct.

2 MR. CANTWELL: Is there any chance I could have some
3 time with them today before I'm taken back to the -- I'm being
4 told by the marshals yes. Okay. That is excellent news.

5 May I hand some papers to the clerk to be added to
6 the record?

7 THE COURT: Yes.

8 MR. CANTWELL: I don't have any stamps yet at the
9 ACRJ. I apologize for the formatting. I haven't been able to
10 purchase lined paper yet since I have gotten there.

11 THE COURT: Yes.

12 MS. DUNN: Your Honor, one thing I want to make sure
13 I understand, and also I've gotten several questions about this
14 from my colleagues, which is given the strong feelings on all
15 sides of these issues, there is concern about adjudicating some
16 of these issues in front of the entire venire. So I know Your
17 Honor does not want to do very much at sidebar, but the
18 question is whether we can have these conversations with the
19 jurors, or Your Honor can have the conversations with the
20 jurors at sidebar so that we don't infect the entire panel.

21 THE COURT: On questions that -- particular follow-up
22 questions, maybe. We'll sort of play it by ear. I'm aware of
23 what can happen if asked a general question. We'll try to take
24 care of it.

25 MS. DUNN: Thank you, Your Honor. We appreciate it.

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1 THE COURT: Anything else?

2 MR. CANTWELL: I have just one more very brief thing.
3 I've been trying to see about getting court-appropriate attire
4 delivered to the jail. That's another thing that I'm waiting
5 for a response for from the captain.

6 THE COURT: I've written an order that you have -- do
7 you have -- I take it you mentioned -- I brought it up the
8 other day and you said you could have --

9 MR. CANTWELL: All I was going to say is I wonder if
10 maybe I could have them delivered to the Court because I
11 haven't gotten an answer from the jail yet.

12 The marshal's telling me he'll take care of it.
13 Thank you.

14 THE COURT: But you have access to clothing?

15 MR. CANTWELL: Yes, I have access to the clothing. I
16 just have to figure out where to get it. The marshal is saying
17 I can receive it here. Thank you.

18 THE COURT: It's not going to be feasible, obviously,
19 to have the sidebar and everybody gather round. So it may
20 be -- it will probably be necessary to excuse the jury in that
21 time. I'd just ask everybody to try to limit the number of
22 those incidents because it just takes so much time to take the
23 jury in and out.

24 MS. DUNN: I think, Your Honor, we want to be very
25 respectful of what you just said. Having gone through all the

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1 questionnaires at this point, there are many people who say
2 that they can't be impartial because of strong feelings. They
3 have very extreme feelings. So I want to flag this now, rather
4 than have a catastrophe on Monday.

5 THE COURT: I understand that. I mean, there are
6 ways we've done it -- like in capital murder cases we've had to
7 do individual voir dire in many cases.

8 MS. DUNN: It is possible that in this case that may
9 be a suggestion. Obviously, we defer to the Court, but I would
10 rather flag it now than wait until we have the jurors here.

11 THE COURT: There are general questions that apply
12 that are fairly innocuous but reveal general qualifications to
13 serve. We can do all those at one time.

14 MS. DUNN: Thank you, Your Honor.

15 THE COURT: All right. Anything else today?

16 MR. SMITH: Your Honor, I'd probably be -- I think I
17 want to be careful about when plaintiffs are complaining about
18 jurors potentially being -- having extreme views about this.
19 You know, the plaintiffs --

20 THE COURT: Well, they're on both sides. I mean, if
21 you read these questionnaires, you know, this is not -- I mean,
22 this is --

23 MR. SMITH: Yeah, I understand, Your Honor.

24 THE COURT: There's extreme views on both sides.

25 MR. SMITH: I'm not sure that -- you know, I'm not

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1 sure that that alone should be something that excludes them.
2 But, I mean, plaintiffs, I did point out in my emergency motion
3 for a protective order that plaintiffs have been engaging in
4 extreme rhetoric online about this case and about the
5 defendants, and it's perfectly -- you know, it seems to me, and
6 I suggested --

7 THE COURT: Mr. Smith, I don't -- you know, what
8 you're doing is inviting another response from the plaintiffs.
9 If you've got any problem, file a motion, if you want me to
10 take some action. But just for us to sit here and talk back
11 and forth is not going to be productive.

12 Okay. Anything else?

13 MS. DUNN: No, Your Honor.

14 THE COURT: Okay. We'll recess and I'll see you all
15 Monday morning at 9:30.

16 (Proceedings adjourned, 1:26 p.m.)
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C E R T I F I C A T E

I, Lisa M. Blair, RMR/CRR, Official Court Reporter for the United States District Court for the Western District of Virginia, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings reported by me using the stenotype reporting method in conjunction with computer-aided transcription, and that same is a true and correct transcript to the best of my ability and understanding.

I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

/s/ Lisa M. Blair

Date: October 22, 2021